Supreme Court, U.S.
FILED

961682 APR 2 1 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

JONAS STELMOKAS, a/k/a JONAS STELMOKEVICIUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN ROGERS CARROLL
Counsel of Record
CARROLL & CARROLL
Attorneys for Petitioner
400 Market Street
Suite 850
Philadelphia, Pennsylvania 19106
(215) 925-4100

70981 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

191PP

QUESTION INVOLVED

Is the security of naturalized citizenship seriously compromised by a Third Circuit decision upholding denaturalization on the ground that a Lithuanian Policeman was ordered to serve for 24 hours in September, 1941 as a guard in a neighborhood adjoining the Kaunas ghetto, with no evidence that he actually so served?

TABLE OF CONTENTS

	Page
Question Involved	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Supreme Court Jurisdiction	1
Statutes and Treaty Involved	1
Statement of the Case	3
A. The District Court Proceedings	3
District Court's Original Jurisdiction	13
Reasons for Granting the Writ	13
I. The Third Circuit Decision Undermines The Security Of Naturalized Citizenship.	13
II. The Third Circuit Decision Has Radically Split From Other Circuits In Changing The Legal Standard Of Proof In Denaturalization. This Is A Gross Departure From Established Supreme Court Jurisprudence.	15
A. The Burden of Proof.	15

Contents

Page

B. The Substantive DPA Test of Persecution. 16

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

Baumgartner v. United States, 322 U.S. 665, 88 L. Ed. 1525, 64 S. Ct. 1240 (1944) 14

Costello v. United States, 365 U.S. 265, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961) 14

Demjanjuk v. Petrovsky, 10 F.2d 338 (CA6 1996) 14

Fedorenko v. United States, 449 U.S. 490, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981) 15, 16, 17

Kungys v. United States, 485 U.S. 759, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) 16

Schneiderman v. United States, 320 U.S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 (1943) 14

Shestaway v. United States, 714 F.2d 1038 (CA10 1983) 17

Sprogis v. United States, 763 F.2d 115 (CA2 1985) ... 17

Contents

	Page
United States v. Lindert, 907 F. Supp. 1114 (N.D. Ohio 1995)	17
Statutes Cited:	
8 U.S.C. § 1451(a)	1, 13
28 U.S.C. § 1254(1)	1
The Displaced Persons Act of 1948, PL 774, Ch. 647, 62 Stat. 1009	2
DPA § 10	4
DPA § 13	4
Other Authorities Cited:	
22 C.F.R. § 53.32, *et seq.*	4
Constitution of the International Refugee Organization, Annex I	3
APPENDIX	
Appendix A — Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated January 21, 1997	1a
Appendix B — Opinion of the United States Court of Appeals for the Third Circuit Decided November 12, 1996	3a

Contents

	Page
Appendix C — Judgment of the United States Court of Appeals for the Third Circuit Dated November 12, 1996	102a
Appendix D — Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania Filed August 2, 1995	104a
Appendix E — Government Exhibit 4.35 - English Translation	163a

OPINIONS BELOW

The three opinions of the Third Circuit panel at No. 95-1894 are published at 100 F.3d 302 and printed in Appendix A.

The opinion of the District Court for the Eastern District of Pennsylvania at Civil No. 92-03440 is not officially published but is available at 1995 WL 464264 (E.D. Pa. August 2, 1995). This memorandum is attached as Appendix B.

SUPREME COURT JURISDICTION

The judgment of the Third Circuit was entered on the date of its opinions, November 12, 1996. The Judgment is attached as Appendix C.

The order denying appellant's petition for rehearing is dated February 21, 1997 and is attached as Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND TREATY INVOLVED

IMMIGRATION AND NATIONALITY ACT OF 1952 (8 U.S.C. § 1451(a)):

> (a) Concealment of material evidence; refusal to testify
>
> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the United States in the judicial district in

which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively . . .

THE DISPLACED PERSONS ACT OF 1948, PL 774, Ch. 647, 62 Stat. 1009:

An act to authorize for a limited period of time the admission into the United States of certain European displaced persons for permanent residence, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the Displaced Persons Act of 1948.

Sec. 2. When used in this Act the term —

(a) "Commission" means the Displaced Persons Commission created pursuant to this Act;

(b) "Displaced person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization.

CONSTITUTION OF THE INTERNATIONAL REFUGEE ORGANIZATION, ANNEX I:

Part II

Persons who will not be the concern of the Organization

1. War criminals, quislings and traitors

2. Any other persons who can be shown:

   a. to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

   b. to have voluntarily assisted the enemy forces since the outbreak of the second World War in their operations against the United Nations

STATEMENT OF THE CASE

A. The District Court Proceedings

This denaturalization complaint alleged that petitioner was ineligible for a visa under the D.P.A. because he served as an

officer in Lithuanian Auxiliary Police Battalions between 1941 and 1944 and also briefly as an enlistee in the German Air Force and in his police capacity he: 1) assisted the Nazis in the persecution of civilian populations; and 2) voluntarily assisted enemy forces against the allies; and 3) misrepresented these activities in his visa application. A separate charge of misrepresentation in petitioner's 1954 naturalization application was dismissed by the district court. That court sustained all of the government's claims of illegal procurement of citizenship based on petitioner's ineligibility for a D.P.A. visa but only those based on Finding No. 10, *infra*, remain to be considered.[1]

Only four witnesses were called by the government and none by the petitioner. Two of the witnesses described their personal experiences as survivors of the Kaunas massacre. They knew nothing of petitioner or his police unit. The third witness was an Office of Special Investigations employee who found various auxiliary police battalion documents in the Lithuanian State Archive in Vilnius. These documents and the testimony of the fourth witness, Professor Rauol Hilberg, a holocaust expert

---

1. The Third Circuit opinion makes clear (App. B, p. 14a-16a) that each of the six legal conclusions of illegal procurement is based on the same conduct found by the district court; namely, petitioners acting as a ghetto guard commander and participating in the October 29, 1941 massacre of 9,200 Jews. (The massacre finding received only one vote on the Third Circuit panel.) Based on these findings alone, the court below affirmed the judgment on all six legal bases found by the district court: (1) DPA visa ineligibility because of assistance in persecution of civil populations; (2) DPA ineligibility based on voluntary assistance to enemy forces for the same conduct; (3) membership in a movement hostile to the United States and its form of government (DPA § 13) for the battalion's participation in the same conduct; (4) misrepresentation of occupation and residence to DPA analyst, rendering the applicant ineligible under DPA § 10; (5) ineligibility under 22 C.F.R. § 53.32, *et seq.* of November 14, 1941 for advocacy or acquiesence in conduct contrary to civilization and human decency; (6) lack of good moral character for the same misrepresentation.

regularly employed by the government in similar denaturalization cases, constitute the evidence. None of the evidence supports the conclusion stated in the district court's Finding No. 10 that petitioner acted as a ghetto guard commander.

The District Court Finding of Fact No. 10 reads:

> 10. As commander of the ghetto guard in Kaunas on September 16-17, 1941, defendant was responsible for enforcing the confinement of Jews to the repressive conditions of the ghetto. Defendant's service as ghetto guard commander is sufficient to establish assistance in persecution.

2. The Appeal

The only legal underpinning of the denaturalization which survives the Third Circuit decision is that petitioner assisted the enemy in persecuting civilian populations by acting for 24 hours as ghetto guard commander. This conclusion is specifically based on an Auxiliary Police Third Battalion Order of September 15, 1941 assigning petitioner as "Guard commander in Vilijampole on September 16, 1941." (Govt. Ex. 4.35, App. E, p. 163a-167a).

The Third Circuit panel produced three opinions. The lead opinion (Greenberg, J.) does not discuss or analyze the evidence at all. Its treatment of petitioner's posting as commander of the ghetto guard is stated in a single paragraph. (App. B, p. 12a) as follows:

> The court found that on September 15, 1941,

> Stelmokas was a guard commander at Vilijampole, which was the ghetto in Kaunas. The evidence showed clearly, unequivocally, and convincingly, that Stelmokas served as the commander of the ghetto guard for at least a 24-hour period commencing on September 16, 1941, at 1:00 p.m. and, accordingly, that he participated in confining the Jews to an area in which they were regularly subjected to extreme deprivation, brutality, and arbitrary shootings.

The concurring opinion (Stapleton, J.) quotes the September 15th order (App. B, p. 58a) and discusses its interpretation (*ibid.* p. 51a-59a) concluding that it is more likely than not that this order included ghetto guard posts. The concurring opinion does not speak to whether the order was carried out; it nevertheless, upholds Finding No. 10. The pertinent discussion (App. B, p. 58a) follows:

> Two weeks later, on September 15, 1941, the same Battalion Commander entered another order, section 1 of which made the following duty assignments:
>
> Security and service duties for 16 September of the current year:
>
> Battalion Duty Officer Junior Lieutenant TAMULAITIS, VYTAUTAS
>
> Assistant to the Duty Officer — Corporal KVARACIEJUS
>
> Duty Clerk at the Battalion Headquarters — Corporate AUKSORAITIS

Guard Commander in Vilijampole — Junior Lieutenant STELMOKAS

Guards from the 3d Company

While this order was lengthy and dealt with a variety of subjects, these were the only current duty assignments recorded.

The record discloses that the ghetto was located in a section of the city called "Vilijampole" and that "Vilijampole" was frequently used as a synonym for the ghetto. As Stelmokas stresses, the record also indicated, however, that Fort VIII, while in the area called Vilijampole, was not in the ghetto. Based on this evidence, Stelmokas suggests that the order assigning him as "Guard Commander in the Vilijampole" is ambiguous — that the assignment might have been merely to guard ammunition at Fort VIII.

While I agree with Stelmokas that the government had the burden of proving Stelmokas' participation in the persecution of Jews by clear, convincing and unequivocal evidence, his suggestion of a significant ambiguity in the record is unpersuasive. Dr. Hilberg and the September 1st order itself indicate that in the context of guard duty, the words "Fort VIII" was generally included in the designation of that guard post in order to distinguish duty there from the duty of the guarding the ghetto. More importantly,

> Stelmokas commanded a platoon consisting of something over 30 men and it is far more likely that he was given responsibility for Guard Post 21 or both Guard Posts 21 and 3, than that he commanded only the four guards at Fort VIII. Finally, and most importantly, the September 15th order reports only two command assignments: the "Battalion Duty Officer" and the "Guard Commander at Vilijampole." The suggestion that this order would record the identity of the commander of a four man unit at Fort VIII and omit entirely any mention of the Guard Commander of the ghetto strikes me as too far fetched to raise even a reasonable doubt.

The dissent (Aldisert, S.J.) discusses this order at App. B, p. 65a, *et seq.* and criticizes the absence of evidence or logical inference of petitioner's participation as a ghetto guard commander based upon the order alone. We quote its pertinent statements on this issue:

> A. September 16-17, 1941
>
> I accept that Order #10 of the 3rd Auxiliary Police Service Battalion, dated September 15, 1941, indicates that "Junior Lieutenant STELMOKAS" was detailed as "Guard Commander in Vilijampole." A1316. From this, and from evidence that two Jews were killed in the Kaunas ghetto between September 16 and 17, 1941, the district court reached the following conclusion:
>
> The Court finds that the Government

> has not established by clear, unequivocal, and convincing evidence that the shootings on September 16-17, 1941 were carried out by either the defendant or Schutzmannschaft members under his command. However, the Government has established by clear, unequivocal, and convincing evidence that defendant was commander of the ghetto guard for a 24-hour period commencing September 16, 1941, at 1 p.m., that Jews in the ghetto were subject to extreme deprivation, brutality, and arbitrary shootings during that period, and that defendant was responsible for enforcing the confinement of Jews in such conditions.

A conclusory inference predicated on a clear and narrowly established fact might have been sufficient to inculpate Stelmokas. However, an inference teased from a series of other inferences may not substitute for hard evidence where the government's burden is so high. And that is the extent of the government's case and that is also why the district court found that "the government has not established by clear, unequivocal, and convincing evidence that the shootings on September 16-17, 1941 were carried out by either the defendant or Schutzmannschaft members under his command." F.F. 60. The district court went further, however, and concluded that Stelmokas was commander of

the ghetto guard and enforced confinement of Jews in horrible conditions. Because the government did not meet its high burden of proving these aspects of its allegations, the district court erred.

Unlike virtually every other case prosecuted by the Office of Special Investigations, here no direct evidence shows that Stelmokas confined Jews to the ghetto during the days in question. Indeed, the direct evidence presented in this case is limited to the following: That deployed in the Faunas, Lithuania area were at least two Lithuanian army units under the control of the Nazis — the 3rd Auxiliary Police Service Battalion (also described hereafter as Schutzmannschaft), in which Stelmokas was an officer, and a Sonderkommando company of approximately 205 Lithuanian partisans, in which Stelmokas was not a member; that Stelmokas was listed as "Guard Commander in Vilijampole" of the 3rd Battalion; that shootings of Jews in the ghetto by Nazis and Lithuanians frequently occurred; and that two Jews were killed in the ghetto on September 17.

It is uncontradicted that "Vilijampole" was a neighborhood containing not only the ghetto, but also surrounding areas including Fort VIII, which was situated 100 meters or more from one border of the ghetto. It bears repeating that although Stelmokas is accused of commanding the Vilijampole guard on this

> day, *there is no direct proof* that he commanded the ghetto guard and was responsible for enforcing the confinement of Jews in the ghetto. We are left to infer that a single written order that Stelmokas was "Guard Commander in Vilijampole" demonstrates that the 3rd Battalion, and not the *Sonderkommando* company, was the ghetto guard on this day. We are left to speculate whether the 3rd Battalion was not merely assigned to guard adjacent areas, including bridges, warehouses, ammunition depots etc. A518-A519. The evidence leaves unanswered the question of whether the unit patrolled parts of the Vilijampole neighborhood that did not include the ghetto — an area that also encompassed non-Jewish residences, businesses and an ammunition warehouse — the ghetto itself, or both. To repeat, there was no direct evidence supporting the district court's determination and the quality of circumstantial evidence was so inferior that it did not satisfy the government's high burden of proof.

(Emphasis in original).

> No evidence supported the district court's conclusion other than the fact that Stelmokas was assigned as "Guard commander of Vilijampole" at the time two Jews were killed in the ghetto. No evidence, beyond his assignment, indicated that he in fact served with, or commanded, the ghetto guard. No evidence demonstrated that Stelmokas

> engaged in the conduct or duties the district court attributed to ghetto guards generally.

F.F. 49-60. (App. B, pp. 66a-67a).

* * *

> The district court's conclusion that the government established by clear, unequivocal, and convincing evidence that defendant was commander of the ghetto guard during the relevant period and thereby responsible for enforcing confinement of Jews is based only upon the fact that he was "assigned" as "Guard Commander in Vilijampole." Even if such a conclusion were supported by the evidence, and I do not believe it was, it would be insufficient grounds on which to denaturalize a citizen under the reasoning of *Sprogis*. Accordingly, the evidence regarding Stelmokas' conduct on September 17, 1942 (sic) was not sufficient to sustain the district court's conclusion in Count I.

(*Ibid.* p. 72a).

The prosecution's contention that Vilijampole and the ghetto are synonyms suffers uncertainty, even in the mind of its expert. Professor Hilberg testified (3d Cir. App. p. A581):

> I cannot give you 100 percent certainty. But it is my conclusion that the intent here is to guard the ghetto, because I believe in this context Vilijampole is a synonym for the

> ghetto. I am not insisting that I must be right. But I really don't see a reasonable alternative.

(A581).

Finding No. 10 is the essential predicate of this denaturalization; it is the only legal predicate to obtain two votes in the Third Circuit.

DISTRICT COURT'S ORIGINAL JURISDICTION

District Court jurisdiction is based on § 340 of the Immigration and Nationality Act of 1952 as amended; 8 U.S.C. § 1451(a), *supra* at p. 1, which obliges United States Attorneys to sue for denaturalization:

> . . . in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, . . .

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT DECISION UNDERMINES THE SECURITY OF NATURALIZED CITIZENSHIP.

The OSI reports that it has accomplished fifty-nine denaturalizations and is conducting 300 more ongoing investigations. (New York Times, April 11, 1997 describing Chicago denaturalization judgment in U.S. District Court in the case of Bronsilaw Hajda.) These figures reflect, though inadequately, the insecurity of the Eastern European expatriate community in the United States about the enduring vitality of

naturalized citizenship against baseless charges of misconduct during the World War II German occupation of the Baltic and Eastern European areas. This concern is deep and pervasive, based on a correct perception that American courts do not accurately appreciate or concern themselves with the grim conditions in which these immigrants lived under Nazi occupation. The anxiety increases when flimsy or false evidence is allowed to satisfy the burden of proof.

The Third Circuit's decision has provided further cause for alarm in the naturalized community and will predictably unsettle and degrade an entire class of citizens who are not native born.

The government's case rests solely on ancient documents; there were no living witnesses to any misconduct of petitioner and the Third Circuit has simply changed the law to dispense with proof of conduct constituting assistance in persecution. This disturbing decision will augment the fears resulting from the events described by the Sixth Circuit in *Demjanjuk v. Petrovsky*, 10 F.2d 338 (CA6 1996) in which that petitioner was sentenced to death on the American evidence and was only saved by Israeli investigation.

In the only two cases this Court has decided involving denaturalization for alleged wartime collaboration, a Ukrainian and a Lithuanian were charged, the former as a Treblinka guard and the latter as a Lithuanian Auxiliary Policeman. Those cases established a substantial legal barrier to denaturalizing unpopular defendants on inadequate evidence. This standard was developed in earlier unpopular defendant cases involving a racketeer, a bundist and a communist. *See Costello v. United States*, 365 U.S. 265, 269, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961); *Baumgartner v. United States*, 322 U.S. 665, 675, 88 L. Ed. 1525, 64 S. Ct. 1240 (1944); *Schneiderman v. United States*, 320 U.S. 118, 122, 87 L. Ed. 1796, 63 S. Ct. 1333 (1943). This Court said:

> . . . our decisions have recognized that the right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences . . . For these reasons, we have held that the government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship . . ." The evidence justifying revocation of citizenship must be "clear, unequivocal and convincing" and not leave "the issue in doubt."

Fedorenko v. United States, 449 U.S. 490, 505, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981). The judgment below abandons this standard.

II.

THE THIRD CIRCUIT DECISION HAS RADICALLY SPLIT FROM OTHER CIRCUITS IN CHANGING THE LEGAL STANDARD OF PROOF IN DENATURALIZATION. THIS IS A GROSS DEPARTURE FROM ESTABLISHED SUPREME COURT JURISPRUDENCE.

A. The Burden of Proof.

The action of the Third Circuit in this case beggars the meaning of "clear, unequivocal and convincing." It has sanctioned denaturalization based upon a single ambiguous document found in a Lithuanian archive after 50 years, assigning petitioner as guard commander in Vilijampole, without evidence that the order was communicated to petitioner, that he was even in Kaunas on the day of the order or that he was able to obey it

or did obey it. No one pretends there is any evidence of compliance; the denaturalization rests exclusively on the written order.

This decision signals a gross departure from this Court's *Fedorenko - Kungys* jurisprudence, *Kungys v. United States*, 485 U.S. 759, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988), (reversing the Third Circuit's materiality judgment on a charge of misrepresenting his occupation and residence by a Lithuanian policeman.) *Kungys* emphasized that the materiality of an alleged misrepresentation must also be proved by "evidence that is clear, unequivocal and convincing." *Kungys*, 485 U.S. at 772.

B. The Substantive DPA Test of Persecution.

Substantively, the *Fedorenko* construction of the persecution provision of the IRO Constitution is sketched in footnote 34 of Justice Marshall opinion (449 U.S. at 512):

> Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Fedorenko established a requirement of some personal conduct constituting "assisting the enemy in persecuting . . ." This view has been followed by all circuits since 1982. The instant petition presents the first case where no conduct of the defendant is proved but his denaturalization is ordered by the Court of Appeals based on what he was directed to do, without any evidence that he did it. This judgment is at odds with decisions of the Second and Tenth Circuits in *Sprogis v. United States*, 763 F.2d 115 (CA2 1985) and *Shestaway v. United States*, 714 F.2d 1038 (CA10 1983) and many others which require proof of active conduct assisting in persecution.

In *United States v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio 1995) the court dealt with allegations that the defendant was "under orders to shoot escaping prisoners" but he never had occasion to act or to refuse to act on these orders. The court held, "This court will not judge a person's moral character based solely on the orders issued to that person." 907 F. Supp. at 1125. The emotional potency of the evidence of the Nazi holocaust creates an "hydraulic pressure that tends to distort our judgment." Stevens J., dissenting in *Fedorenko*, 449 U.S. at 538.

In the emigre community throughout the United States, when a denaturalization such as the instant one, based on patently inadequate grounds is upheld by a Court of Appeals, confidence in the process is lost and the governmental pursuit becomes counterproductive. The Third Circuit's decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONCLUSION

We respectfully request that the writ be allowed.

Respectfully submitted,

JOHN ROGERS CARROLL
Counsel of Record
CARROLL & CARROLL
Attorneys for Petitioner
400 Market Street
Suite 850
Philadelphia, Pennsylvania 19106
(215) 925-4100

APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1894

UNITED STATES OF AMERICA

v.

JONAS STELMOKAS, a/k/a JONAS STELMOKEVICIUS,

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 92-03440)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and ALDISERT, *Circuit Judges*

The petition for rehearing filed by the appellant, Jonas Stelmokas, a/k/a Jonas Stelmokevicius, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a

majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

s/ illegible
Circuit Judge

DATED: JAN 21 1997

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DECIDED NOVEMBER 12, 1996

UNITED STATES of America

v.

Jonas STELMOKAS, a/k/a Jonas Stelmokevicius,

Appellant.

No. 95-1894.

United States Court of Appeals,
Third Circuit.

Argued June 10, 1996.

Decided Nov. 12, 1996.

* * *

Before: STAPLETON, GREENBERG, and ALDISERT, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. PROCEDURAL AND FACTUAL HISTORY

Defendant Jonas Stelmokas appeals from a final judgment entered August 2, 1995, in favor of the government on six counts of its seven-count complaint seeking judgment on seven

discrete bases revoking Stelmokas's citizenship and ordering him to surrender his certificate of naturalization. The court entered judgment in favor of Stelmokas on a seventh count of the complaint.

The government initiated this action on June 15, 1992, by filing the complaint against Stelmokas in the district court pursuant to section 340(a) of the Immigration and Nationality Act of 1952, as amended ("INA"). 8 U.S.C. § 1451(a). The government sought judgment revoking and setting aside the judgment of the United States District Court for the Eastern District of Pennsylvania which admitted Stelmokas to citizenship in 1955. It further sought judgment canceling Stelmokas's certificate of naturalization.

In its complaint, the government alleged that Stelmokas was born in Moscow, Russia, and resided in Lithuania commencing in 1930. From 1936 until 1939 Stelmokas attended the Lithuanian army officers' school in Kaunas, Lithuania, from which he graduated in 1939. From August 1939 until July 1940 Stelmokas was an officer in the Lithuanian army.

The complaint alleged that in June 1941 the armed forces of Nazi Germany occupied Lithuania, which occupation continued until August 1944. During the occupation, the Germans organized armed Lithuanian units known as *Schutzmannschaft* to assist the Germans in the occupation and in the persecution of Jews and other unarmed persons on the basis of their race, religion, national origin, or political opinion. The Germans also organized *Schutzmannschaft* in other countries who arrested, detained, assaulted, and murdered victims in Poland, Ukraine, Byelorussia, and other areas. The Lithuanian *Schutzmannschaft* in Kaunas assisted the Germans

in confining and murdering Jews. The government contended that Stelmokas was a voluntary member and officer of the *Schutzmannschaft* and advocated, assisted, participated, and acquiesced in the murder and persecution of Jews and other unarmed civilians in Lithuania. Around August 1944, at the time the German occupation of Lithuania ended, Stelmokas entered the German Air Force *(Luftwaffe)* in the 91st Light Flak Replacement Unit.

The complaint further alleged that in July 1949 Stelmokas sought a determination from the United States Displaced Persons Commission ("DPC") that he was a displaced person as defined in the Displaced Persons Act of 1948 ("DPA"), Pub.L. No. 80-774, ch. 647, 62 Stat. 1009 (1948), and therefore was eligible to immigrate to the United States. In connection with his application, a DPC analyst interviewed Stelmokas. He did not inform the analyst that he had served in the *Schutzmannschaft* or the *Luftwaffe.* Rather, Stelmokas falsely claimed that he had been a teacher in Seda, Lithuania, from July 1940 until August 1943. He claimed that he then was unemployed in Kaunas until July 1944, and was a laborer in Dresden, Germany, from 1944 until March 1945. The complaint alleged that in 1949 the DPC regarded the *Schutzmannschaft* to be "inimical" to the United States, meaning it was a hostile movement.

The complaint further stated that, in reliance on Stelmokas's misrepresentations, the DPC analyst concluded that Stelmokas was eligible for displaced person status, and that the DPC so certified him on July 8, 1949. On or about August 10, 1949, Stelmokas applied for a visa to enter the United States. In connection with that application, Stelmokas repeated to an American vice-consul in Hamburg, Germany, the benign wartime history that he had related to the DPC analyst and

omitted his actual wartime employment history. Based on Stelmokas's false representations, the vice-consul approved Stelmokas's application for a visa. Stelmokas then entered the United States as a displaced person and permanent resident on August 31, 1949.

The complaint asserted that on or about November 12, 1954, Stelmokas filed an application for naturalization with the Immigration and Naturalization Service. Again, Stelmokas misrepresented under oath his personal history by claiming that the only organization to which he belonged before 1945 was the Lithuanian Boy Scouts. Thus, he concealed his membership in the *Schutzmannschaft* and the *Luftwaffe*. On April 11, 1955, the district court granted his petition for naturalization.

The government requested that the court revoke Stelmokas's naturalization for the following reasons: (1) he illegally procured his naturalization because he was ineligible for a visa to enter the country as he had assisted in persecuting civilian populations (Count I); (2) he illegally procured his naturalization because he was ineligible to enter the country as he voluntarily had assisted enemy forces during World War II in their operations against the United Nations (Count II); (3) he illegally procured his naturalization because as a member of the *Schutzmannschaft* and the 91st Light Flak Replacement Unit he was ineligible to enter the country because he had been a member of and participated in movements hostile to the United States (Count III); (4) he illegally procured his naturalization because he had misrepresented his wartime service to the DPC and to the vice-consul and thus was ineligible to enter the country (Count IV); (5) he illegally procured his naturalization because he was ineligible for a visa as he had advocated or acquiesced in activities or conduct contrary to civilization and human decency

on behalf of Axis countries during World War II and thus was ineligible to enter the country (Count V); (6) he illegally procured his naturalization as his participation in the Nazi program of persecution demonstrated that he was not of good moral character and thus he was ineligible to enter the country (Count VI); and he illegally procured his naturalization by concealing and misrepresenting material facts, *i.e.*, his service in the *Schutzmannschaft* and the 91st Light Flak Battalion when he filed his petition for naturalization (Count VII).

Stelmokas filed an answer to the complaint in which he admitted the historical facts regarding the German occupation of Lithuania and admitted that he had applied for entry into the United States as a displaced person. However, he refused to answer the allegations in the complaint regarding his wartime activities as he claimed "that his answers could be used against him in criminal proceedings in the United States and other countries." The government then moved to compel Stelmokas to answer the complaint on the ground that Stelmokas could not rely on the Fifth Amendment to refuse to answer.

On April 16, 1993, the district court granted the government's motion as it concluded that either the sections of federal law under which Stelmokas feared prosecution were inapplicable to him or the statute of limitations barred prosecutions under them. Thus, the court concluded that Stelmokas did not face a real and substantial threat of prosecution in the United States. The court also found that Stelmokas did not face a real and substantial threat of prosecution in "other countries," and thus it had no need to determine whether the Fifth Amendment applied to foreign prosecutions. The court, however, protected Stelmokas by ordering that his answer be filed under seal. Stelmokas never

complied with the order and did not file an amended answer. Furthermore, at a deposition on August 4, 1993, Stelmokas pleaded the Fifth Amendment and refused to answer questions germane to this case.

The court conducted a bench trial from February 27, 1995, until March 3, 1995. At the outset of the trial Stelmokas's attorney pointed out that Stelmokas had pleaded the Fifth Amendment. He then indicated that he wanted to keep his options open and that he did not know what he would advise Stelmokas to do. He said that Stelmokas "may waive the privilege." Stelmokas, however, did not waive the privilege and did not testify at the trial.

The district court decided the case in a comprehensive memorandum opinion dated August 2, 1995. In its opinion the court set forth the background of Stelmokas's application to come to the United States and his obtaining citizenship. The court noted that citizenship is a precious right which once conferred may not be revoked lightly. Consequently, the government in a denaturalization proceeding must prove its case by clear, unequivocal, and convincing evidence so as not to leave the issue, *i.e.*, the basis for denaturalization, in doubt. *Kungys v. United States*, 485 U.S. 759, 772, 108 S.Ct. 1537, 1547, 99 L.Ed.2d 839 (1988); *Fedorenko v. United States*, 449 U.S. 490, 505, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981). The court noted, however, that aliens have no right to naturalization unless all statutory requirements are complied with. Consequently, every certificate of citizenship is granted on the condition that the government may revoke it if it was not issued in accordance with the applicable requirements. *Fedorenko*, 449 U.S. at 506, 101 S.Ct. at 747.

Appendix B

The court pointed out that section 340(a) of the INA provides the statutory bases for revocation of citizenship: that the citizenship had been "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a). The court then indicated that citizenship is "illegally procured" when obtained without compliance with the statutory requirements for naturalization. *Fedorenko,* 449 U.S. at 506, 101 S.Ct. at 747. When Stelmokas was naturalized in 1955, the INA required that he reside continuously in the country for at least five years after being lawfully admitted for permanent residence. 8 U.S.C. § 1427. *See United States v. Osidach,* 513 F.Supp. 51, 63 & n. 4 (E.D.Pa.1981).

The court then observed that the DPA authorized the issuance of immigration visas to eligible European "displaced persons" without regard to immigration quotas, but that persons who "assisted the enemy in persecuting the civilian populations" of countries that were members of the United Nations or voluntarily assisted the enemy forces since the outbreak of World War II in their operations against the United Nations were not displaced persons. DPA § 2(b), 62 Stat. 1009, 3051-52 (incorporating by reference International Refugee Organization Constitution's definition of displaced person). *See Fedorenko,* 449 U.S. at 495 & n. 3, 101 S.Ct. at 741 & n. 3. Additionally, DPA § 13 prohibited the issuance of visas to "any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States." 62 Stat. 1014. Section 10 of the DPA provided that any "person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 62 Stat. 1013.

Appendix B

The court further noted that at the time of Stelmokas's immigration in 1949, a State Department regulation forbid the issuance of a visa to any alien who had "advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries" during World War II. The court also indicated that when Stelmokas was naturalized in 1956, the law provided that citizenship could be conferred only on persons "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." 3 U.S.C. § 1427(a)(3). Finally, the court pointed out that the INA provided that citizenship procured by willful concealment or misrepresentation of a material fact must be revoked. 8 U.S.C. § 1451.

The district court made an evidentiary ruling in its opinion that Stelmokas challenges on this appeal. It noted that Stelmokas had pleaded the Fifth Amendment in his answer and had refused on Fifth Amendment grounds to answer questions at his deposition. Furthermore, Stelmokas had not testified at trial. The court held that Stelmokas's attorney's statement at the outset of the trial that Stelmokas "may waive the privilege" was not a waiver of the privilege against self-incrimination, but was the opposite, since it was not a statement that the privilege was waived. The court then held that since the case was civil rather than criminal it, as the finder of fact, could infer from Stelmokas's invocation of the privilege against self-incrimination that his testimony would have been unfavorable. *See Baxter v. Palmigiano,* 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976). The court indicated however, that while it could draw adverse inferences from Stelmokas's claim of the privilege against self-incrimination, it would not base its findings of fact on adverse inferences. Rather, the court would use

Appendix B

Stelmokas's invocation of the Fifth Amendment for "independent and additional support" for its findings of fact.

In its findings of fact, the court preliminarily noted that the government had called four witnesses, two experts on the Holocaust, Dr. Raul Hilberg and Michael MacQueen, and two survivors of the Holocaust in Lithuania, David Levine and Abe Malnick. In addition, the government introduced numerous documents into evidence. Stelmokas did not call any witnesses but did introduce three documents into evidence. The court pointed out that Hilberg was a particularly credible witness with a remarkable knowledge of the documents placed into evidence.

The court noted that many of the documents in evidence had been stored in the archives of the former Soviet Union. While Stelmokas argued that the documents were not trustworthy, the court rejected this contention because Hilberg's and MacQueen's testimony established that they were authentic. Indeed, Hilberg testified that he was not aware of a single World War II Soviet Union archival document that was a forgery. The court concluded that the government "amply established the authenticity and trustworthiness of the documents in evidence."

The court then related Stelmokas's personal history prior to the German invasion, including his graduation from military academy and his service as an officer in the Lithuanian Army and the Soviet Red Army when the Soviet Union annexed Lithuania in 1940. The court explained that the Germans took over Lithuania within a few days of their attack on June 22, 1941, and that the German army was followed by a police unit known as *Einsatzgruppen,* which implemented the German policy of murdering the Jews. The court related that a segment of the indigenous Lithuanian population cooperated with the *Einsatzgruppen* in the murder of the Jews.

Appendix B

Starting in late June 1941, the Germans began organizing Lithuanians who had fought against the Soviet Union into volunteer police battalions. The Germans controlled these units, which became known as the *Schutzmannschaft.* Their function was to guard installations and prisoners, and they guarded the Kaunas ghetto. The *Schutzmannschaft* assisted in the murder of Jews and other persons.

The court found that on July 28, 1941, Stelmokas voluntarily enlisted in the *Schutzmannschaft* and was appointed platoon commander in the 7th Company. The court traced Stelmokas's various assignments in the *Schutzmannschaft,* a process made possible by the meticulous record keeping of the *Schutzmannschaft* units, which court opinions demonstrate was consistent with the Germans' practice during World War II of recording their murderous conduct in specific detail. *See, e.g., United States v. Koziy,* 540 F.Supp. 25, 27 (S.D.Fla.1982), *aff'd,* 728 F.2d 1314 (11th Cir.), *cert. denied,* 469 U.S. 835, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984). By August 30, 1944, Stelmokas had been transferred to Germany where he served in the 91st Light Flak Replacement Unit of the *Luftwaffe.* The records in evidence show that Stelmokas was in a military hospital in Germany on February 12, 1945.

The court found that on September 15, 1941, Stelmokas was a guard commander at Vilijampole, which was the ghetto in Kaunas. The evidence showed clearly, unequivocally, and convincingly, that Stelmokas served as the commander of the ghetto guard for at least a 24-hour period commencing on September 16, 1941, at 1:00 P.M., and, accordingly, that he participated in confining the Jews to an area in which they were regularly subjected to extreme deprivation; brutality, and arbitrary shootings. The court then found, through a painstaking

analysis of the *Schutzmannschaft* records, that Stelmokas's battalion took part in the *Grosse Aktion* of October 28 and October 29, 1941, which involved the murder of precisely 9,200 Jews, and that Stelmokas was on duty at that time. Levine and Malnik, who were children in the ghetto at the time, supported the documentary evidence with eye-witness testimony. While Levine and Malnick did not identify Stelmokas, both testified that armed Lithuanians took part in the murders. The court also made findings that Stelmokas participated in anti-partisan actions and served in the *Luftwaffe*.

The court found that when Stelmokas applied for displaced person status he did not inform the DPC analyst of his *Schutzmannschaft* and *Luftwaffe* service, and that he misrepresented his employment and places of residence for the period of July 1940 until March 1945. The court also noted that the Lithuanian *Schutzmannschaft* appeared on a "List of Organizations Considered Inimical to the United States" issued by the DPC Headquarters in Frankfurt, Germany. The court found that Stelmokas made false statements under oath when he sought his visa application, because he misrepresented his wartime residences and did not reveal his *Schutzmannschaft* or *Luftwaffe* service. The court found that he obtained his visa because of the misrepresentation. The court did not find, however, that Stelmokas made false statements when he was naturalized.

The court then discussed the adverse inferences to be drawn from Stelmokas's claim of the privilege against self-incrimination. It emphasized, however, that the findings of fact we have described did not depend on the drawing of inferences from Stelmokas's claim of the privilege. The court said that it inferred that Stelmokas's testimony would have revealed that

he voluntarily joined the *Schutzmannschaft* and served in it from July 1941 until mid-1944, when he was transferred to Germany to serve in the 91st Light Flak Battalion; he was commander of the ghetto guard at Kaunsas in September 1941; he participated in the murdering of Jews in the *Grosse Aktion* and in fighting against anti-German partisans; and he made false representations to both the DPC analyst and the vice-consul regarding his wartime activities particularly his service in the *Schutzmannschaft* and the *Luftwaffe*, to facilitate his immigration to the United States.

The court then set forth its conclusions of law. It reiterated that the government had to prove its case by clear, unequivocal, and convincing evidence, but that under 8 U.S.C. § 1451(a) Stelmokas's certificate of naturalization must be canceled and his citizenship revoked if his citizenship was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." It also pointed out that Stelmokas could not have procured his citizenship lawfully in 1955 if his admission to permanent residence in 1949 had not been lawful. 8 U.S.C. § 1427; *Fedorenko*, 449 U.S. at 514-16, 101 S.Ct. at 750-52.

The court held that under the DPA § 2(b), 62 Stat. 1009, Stelmokas had been ineligible to immigrate to the United States because his actions in the Kaunas ghetto assisted the enemy in persecuting civilian populations. Consequently, Stelmokas's entry into the United States as a permanent resident was unlawful and he had procured his citizenship unlawfully. *See Fedorenko*, 449 U.S. at 512, 101 S.Ct. at 750 ("an individual's service as a concentration camp armed guard — whether voluntary or involuntary — made him ineligible for a visa"). The court then held that Stelmokas also had been ineligible for a visa because

he voluntarily had assisted enemy forces during World War II. *See United States v. Kowalchuk*, 773 F.2d 488, 496-97 (3d Cir.1985) (in banc), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 303 (1986). Thus, for this additional reason, his entry as a permanent resident was unlawful and he had procured his citizenship unlawfully. The court next held that the *Schutzmannschaft* was a movement hostile to the United States, so that Stelmokas was barred from entering the United States because of his membership in it under DPA § 13, 62 Stat. 1014. Consequently, he had procured his citizenship illegally.

The court held that DPA § 10, 62 Stat. 1013, barred Stelmokas from entering the country for permanent residence because he willfully had misrepresented material facts to gain admission. In particular, he concealed his *Schutzmannschaft* and *Luftwaffe* service from the DPC analyst and the vice-consul. These concealments were material because they misrepresented the facts that he had assisted the enemy in the persecution of civilians, voluntarily assisted the Axis powers in their military operations, and had been a member of a movement hostile to the United States and its form of government. The court found that these misrepresentations would have a natural tendency to influence the DPC and the vice-consul in making their decisions to classify Stelmokas as a displaced person and to admit him to the United States. Consequently, Stelmokas's entry into the United States as a permanent resident was unlawful so he had procured his citizenship unlawfully. *See United States v. Kowalchuk*, 773 F.2d at 493.

The court next held that Stelmokas had procured his citizenship unlawfully because he was not entitled to a visa to enter the country as a permanent resident as he had advocated or acquiesced in activities or conduct contrary to civilization

and human decency on behalf of the Axis countries contrary to the regulations then in effect. The court also held that he did not qualify for naturalization because he lacked good moral character when he was naturalized, so that he had procured his citizenship unlawfully. 8 U.S.C. § 1427(a)(3); 8 U.S.C. § 1101(f). The court held that Stelmokas lacked good moral character because he voluntarily joined the *Schutzmannschaft* enforced the confinement of the Jews in the brutal conditions of the Kaunas ghetto, and was on duty when his battalion assisted in the *Gross Aktion.*

The court held that the government had not established its case in only one respect. Under the INA, procuring citizenship "by concealment of a material fact or by willful misrepresentation" is grounds for denaturalization. 8 U.S.C. § 1451(a). The court held, however, that concealment must be made in order to obtain naturalization for that charge to apply, as distinguished from concealment made to obtain a visa. Accordingly, the court held that the misrepresentations to the DPC analyst and to the vice-consul could not apply to the concealment count with respect to procuring citizenship. The court therefore held that the concealment count failed because the government did not establish that Stelmokas's statements in connection with his naturalization willfully concealed facts or included material misrepresentations of fact.

The court ended its opinion by reiterating that Stelmokas's citizenship could be revoked only on the basis of clear, unequivocal, and convincing evidence. Consequently, the government had a heavy burden in the case. The court then emphasized that there was no doubt but that Stelmokas voluntarily joined the *Schutzmannschaft* in 1941 and served in it until mid-1944, when he was transferred to a *Luftwaffe* unit in

Germany. The court noted that he was the commander of the ghetto guard and was on duty in Kaunas during the *Gross Aktion*, when his battalion assisted in the massacre of 9,200 Jews. Furthermore, the court stated that there was no doubt that he fought anti-German partisans later in the war, and that he willfully misrepresented his wartime activities when he applied for admission to this country. For all these reasons, the court revoked his citizenship. Stelmokas then appealed.

II. DISCUSSION

Stelmokas raises four issues on this appeal. He contends that: (1) the district court erred in drawing adverse inferences based on his Fifth Amendment plea; (2) the district court erred in admitting as ancient documents records made during the German occupation of Lithuania and certain other wartime documents; (3) the government failed to establish its case by clear, unequivocal and convincing evidence so as not to leave its allegations regarding his wartime activities in doubt; and (4) his alleged misrepresentations regarding his wartime employment and residence were not shown to be material. We will discuss these contentions in the order presented.

A. *The privilege against self-incrimination.*

We are perplexed by aspects of Stelmokas's Fifth Amendment argument. He initially contends that the district court erred when it held that he did not face a real and substantial threat of domestic and foreign prosecution. Yet we do not understand how the alleged error prejudiced him because the district court, though overruling his plea of the privilege against self-incrimination, did not sanction him for persisting with that plea. The court did not strike Stelmokas's answer, deem the

allegations of the complaint admitted, enter a default judgment against him, preclude him from presenting witnesses including even himself, or hold him in contempt. *See S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 189-91 (3d Cir.1994).

Quite to the contrary, the district court merely drew inferences against Stelmokas with respect to what his testimony would have revealed had he testified. Of course, as we shall demonstrate, the court could have drawn these inferences even if it had upheld Stelmokas's claim of the privilege against self-incrimination. Thus, while the court overruled Stelmokas's plea of the Fifth Amendment, its ruling had no consequence because the court *acted* as if it had upheld the plea. It thus appears that to the extent the parties' briefs address whether the court correctly overruled the claim of the privilege against self-incrimination, they focus on a non-issue. Therefore, we will not consider whether the court correctly held that Stelmokas could not plead the privilege against self-incrimination.

Stelmokas argues, however, that the court was not justified in drawing inferences against him for two reasons. First, he suggests that, in view of his attorney's statement at trial that Stelmokas "may" waive the privilege, it is not clear that he, indeed, did claim the privilege. Second, he argues that "no penalty may be imposed on a witness asserting the privilege" against self-incrimination. Br. at 19.

We reject both of these contentions. First, the court was justified in treating the case as though Stelmokas never retreated from his claim of the privilege against self-incrimination. Indeed, it hardly could have done otherwise. After all, Stelmokas claimed the privilege in his answer and at his deposition and he never filed an amended answer as the court ordered, or indicate

that he would make himself available to complete his deposition by answering all the questions asked. Rather, his attorney merely said at the trial that he "may" waive the privilege, which he never did.

In *S.E.C. v. Graystone Nash, Inc.*, we pointed out that "because the privilege [against self-incrimination] may be initially invoked and later waived at a time when an adverse party can no longer secure the benefits of discovery, the potential for exploitation is apparent [because abuse may cause] unfair prejudice to the opposing litigant." 25 F.3d at 190. At the very least, therefore, if a party initially claims the privilege against self-incrimination and then intends to waive it, he should do so clearly. If Stelmokas had waived the privilege clearly at the outset of the trial, the government could have asked for an opportunity to take a meaningful deposition. Stelmokas's maneuvering precluded that possibility. Indeed, Stelmokas's attorney at the trial, without apparent recognition of the significance of his statement, essentially admitted that he was abusing the claim of the privilege by indicating that he was keeping his options open and that he did not know what he would advise Stelmokas to do. We will not reward such manipulation. Rather, Stelmokas must bear its consequences.

Second, Stelmokas's argument that he cannot be penalized for claiming the privilege relies on such cases as *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977), and *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). But those cases dealt with the imposition of a substantial penalty for the exercise of the privilege against self-incrimination, *e.g.*, the loss of public office. As we have pointed out, in this case the court did not impose any sanction on Stelmokas because of his refusal to answer questions.

Thus, this case is controlled by the principles set forth in *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). There, a prisoner at a disciplinary hearing was advised that he had a right to remain silent but that, if he did so, his silence would be held against him. He remained silent and his silence was given evidentiary value against him. The Supreme Court held that the use of his silence in this manner was proper. It distinguished the line of cases, including *Lefkowitz* and *Garrity*, that did not allow the imposition of a penalty for pleading the privilege because those cases involved the loss of employment or the opportunity to contract with the state for exercising Fifth Amendment rights. *Id.* at 316-17, 96 S.Ct. at 1557. The Court also distinguished *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), which held that in a *criminal* case a jury could not be instructed that it could draw an inference of guilt from the defendant's failure to testify. *Baxter*, 425 U.S. at 317, 96 S.Ct. at 1557.

The Supreme Court in *Baxter* held that the case was controlled by the principle that, in civil cases, "the Fifth Amendment does not forbid adverse inferences against parties . . . when they refuse to testify in response to probative evidence offered against them." *Id.* at 318, 96 S.Ct. at 1568. Thus, as long as there was independent evidence to support the negative inferences beyond the invocation of the privilege against self-incrimination, the inferences could be drawn. *See also United States v. Local 560 of the Int'l Bhd. of Teamsters, etc.*, 780 F.2d 267, 292 n. 32 (3rd Cir.1985), *cert. denied*, 476 U.S. 1140, 106 S.Ct. 2247, 90 L.Ed.2d 693 (1986). In this case, there was a plethora of independent evidence to support the inferences that the district court drew based on Stelmokas's claim of the privilege, so the court was justified in drawing the inferences it did.

Appendix B

We recognize that even though this is a civil case, *see United States v. Osidach*, 513 F.Supp. 51, 57 (E.D.Pa.1981), it may have drastic consequences for Stelmokas. After all, at oral argument the attorneys told us that an affirmance probably will lead to his deportation. But the severity of the consequences do not alter the legal determination of whether the court may draw inferences against a person pleading the privilege against self-incrimination. *Baxter* itself was a disciplinary case and had penal overtones. We also note that the Supreme Court recently has adhered to the sharp distinction between proceedings which, though possessing what might be regarded as a punitive impact, are civil, and traditional criminal proceedings. Thus, in *United States v. Ursery* __ U.S.__, __, 116 S.Ct. 2135, 2138, 135 L.Ed.2d 549 (1996), the Court held that civil forfeitures in general do not constitute punishment for purposes of the Double Jeopardy Clause. Accordingly, the Court would not regard a civil forfeiture action as a criminal proceeding, even though the proceeding resulted in an owner losing his property. This case cannot be regarded as more punitive than *Ursery*. In sum, a case is either civil or criminal and in the present context this case is civil.

We make one final point on the self-incrimination argument. In this case, there was a bench trial. Thus, unlike a jury trial in which a jury will return a general verdict or answer specific interrogatories, the district court had an opportunity to explain the bases in the evidence for its factual findings. It did so by making it crystal clear that, even if it had not drawn any inferences from Stelmokas's claim of the privilege, it would have made the same factual findings. Accordingly, even if the district court erred in drawing the inferences, its error would have been harmless for, as we explain below, the evidence without the inferences supported the court's findings.

Appendix B

B. *The ancient documents*

Stelmokas argues that the district court erred by admitting into evidence occupation documents obtained from Lithuanian archives and other sources as ancient documents pursuant to Fed.R.Evid. 803(16) which, as an exception to the hearsay rule, allows the admission of "[s]tatements in a document in existence twenty years or more the authenticity of which is established." The challenged documents demonstrated Stelmokas's employment and activities during World War II. In particular, Stelmokas argues that those documents "lack any assurance of trustworthiness." Br. at 22.

Stelmokas focuses his objection on two groups of documents, principally those recovered from the records of the Lithuanian *Schutzmannschaft* that were located at Vilnius, the Lithuanian capital, and secondarily those recovered from German records found at other locations. While Stelmokas recognizes that Germans or Lithuanians purportedly wrote the *Schutzmannschaft* documents, he observes that the Vilnius documents were kept from public inspection by the Soviet Union until 1990. Though he also acknowledges that the government did not have to demonstrate a strict chain of custody for the documents to be admitted, in his view the documents cannot be treated as authentic because it is unclear how they were moved to the Vilnius archives. Thus, he argues that the documents were not found in a place where, if authentic, they "would likely be" as set forth in Fed.R.Evid. 901(b)(8).

Stelmokas further argues that the documents are suspicious because the Germans destroyed many documents demonstrating their criminal conduct, but "preserve[d] evidence of Lithuanian misconduct." Br. at 27. Furthermore, he regards the documents

as questionable because they came from Soviet sources, and he claims that it was Soviet policy to discredit the Baltic states. *Id.* Finally, he argues, though with less particularly, that the government did not establish the chain of custody and authenticity of the second group of documents, *i.e.*, those from German sources.

We review the district court's ruling that admitted the evidence over a challenge to its authenticity under an abuse of discretion standard. *See United States v. McGlory*, 968 F.2d 309, 328 (3d Cir.), *cert. denied*, 506 U.S. 956, 113 S.Ct. 415, 121 L.Ed.2d 339 (1992). Federal Rule of Evidence 901(a) provides that the requirement of "authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a) is written, of course, in general terms, but is followed by Rule 901(b) which includes examples of methods by which to authenticate evidence. Rule 901(b)(8) provides that authentication of an ancient document may be supplied by a demonstration that a document is in such condition as to create no suspicion concerning its authenticity, was in a place where, if authentic, it likely would be, and has been in existence 20 years or more at the time it is offered. Ancient documents are admissible into evidence as an exception to the hearsay rule. *See United States v. Goichman*, 547 F.2d 778, 784 (3d Cir.1976).

We cannot say that the district court abused its discretion in admitting the documents in question. Initially, we observe that Stelmokas's argument in part is self-defeating because his contention that the Germans destroyed documents demonstrating their own criminal conduct, but preserved documents incriminating the Lithuanians, supports rather than undermines

the district court's conclusions that the documents incriminating him were legitimate. Furthermore, the documents were certified by competent Lithuanian archival personnel. Hilberg, who has testified in many cases regarding eastern European Holocaust records and whose expertise cannot be doubted, testified that the documents he examined were authentic and that the documents found in Soviet possession are as reliable as documents from western countries. He said that he found the documents to be reliable and not to be forgeries. He also testified that one would expect to find documents relating to the Lithuanian *Schutzmannschaft* in Vilnius, the Lithuanian capital.

MacQueen testified that he personally searched archives in Lithuania and that the documents he found were authentic and reliable. In particular, he had found *Schutzmannschaft* records implicating Stelmokas in Vilnius, which is where they were likely to be found. Stelmokas simply has not produced any evidence or forwarded any reason to impeach the validity of the documents. *See Sokaegon Chippewa Community v. Exxon Corp.*, 805 F.Supp. 680, 711 n. 34 (E.D.Wis. 1992), *aff'd*, 2 F.3d 219 (7th Cir.1993), *cert denied*, 510 U.S. 1196, 114 S.Ct. 1304, 127 L.Ed.2d 655 (1994).

We also point out that German records demonstrate that while Stelmokas was in the *Luftwaffe*, he was hospitalized in Germany. We cannot conceive that any rational person would believe that someone set out to incriminate Stelmokas and planted fake documents in widely-scattered places for that purpose. If anyone created the documents to injure Stelmokas, the fabricator most peculiarly placed the bulk of the documents in a location where they were not accessible to the public and from which, in fact, they were not released for decades. There certainly is no evidence in the record that anyone hatched such

a bizarre plot. Indeed, Stelmokas does not explain what motivation any person would have had to fabricate documents so as to attribute responsibility to him for the atrocities in Lithuania or how that could have been accomplished. Stelmokas was hardly a prominent figure in the war and it is difficult to conceive why someone would go to the lengths he suggests in order to frame him. Stelmokas's attack on the authenticity of the documents is not substantial.

C. *Sufficiency of the evidence*

Stelmokas next argues that the government failed to establish its case by clear, unequivocal, and convincing evidence so as to leave no doubt as to its allegations regarding Stelmokas's wartime activities. In considering this allegation, we determine whether the district court's findings are clearly erroneous. *Oberti v. Board of Ed.*, 995 F.2d 1204, 1220 (3d Cir.1993). Of course, they will not be clearly erroneous if supported by clear, unequivocal, and convincing evidence.

We have reviewed the record and have concluded that the district court's findings are not clearly erroneous, as the evidence in the record fully supports them. The ultimate factual issue for resolution in this case was whether Stelmokas resided in the United States for five years "after being lawfully admitted for permanent residence." 8 U.S.C. § 1427. If he was not lawfully admitted, he was not eligible for citizenship. Resolution of this issue in turn depends on whether the district court's findings that Stelmokas should have been barred for six different reasons from entering the country were clearly erroneous as to all six. We thus emphasize that even if we upheld the findings on only one of the six bases, we would affirm.

Appendix B

In fact, the government demonstrated beyond all doubt that Stelmokas was not lawfully admitted for permanent residence for all six reasons. The evidence against Stelmokas was overwhelming, even without the inferences the court drew fiom Stelmokas's Fifth Amendment plea and, as Stelmokas called no witnesses, the evidence was not rebutted. In the circumstances, we would serve no useful purpose in detailing all the evidence to support each of the charges against him.

We highlight two examples of how Stelmokas argues his case. He contends that there is no proof that he joined the *Schutzmannschaft* voluntarily. While it is true that no person testified that he recalled seeing Stelmokas sign up for the *Schutzmannschaft,* his contention that there is no proof that he joined voluntarily ignores the record. The evidence shows that when Stelmokas joined the *Schutzmannschaft* service of all its officers was voluntary as there was an ample supply of candidates and conscription was not necessary. Indeed, for at least several months after Stelmokas joined the *Schutzmannschaft,* its members could be released at their own request. Obviously, if the evidence demonstrated that service of all *Schutzmannschaft* officers was voluntary, then a finding that a particular officer served voluntarily is supported in the record. We also point out that in addition to this positive proof that Stelmokas joined the *Schutzmannschaft* voluntarily, the court drew the entirely justified inference from Stelmokas's claim of the privilege against self-incrimination that he joined voluntarily.

Another example of the weakness of Stelmokas's factual arguments is his claim that he did not misrepresent his wartime employment by concealing his membership in the *Schutzmannschaft.* This contention is frivolous, for he acknowledges that he represented to the DPC analyst and the

vice-consul that from 1940 until 1943 he was a teacher in Seda. It is difficult to understand how Stelmokas can argue that he did not misrepresent his status as a *Schutzmannschaft* officer when he represented that he was a teacher for most of the time that he was in reality such an officer.

Stelmokas, however, takes a different approach to what consitiutes a misrepresentation. In post-argument brief that he filed at our direction, he recites that "[a] relevant concealment would have occurred if the government had produced evidence that Stelmokas was asked if he had been a member of *Schutzmannschaft* and said no." Br. at 3. Thus, Stelmokas would require that the examiner have a reason to ask about a specific narrowly defined matter. We reject his approach. In our view, if you falsely represent that your employment is one thing when your actual employment is completely different, then you have concealed your true employment. In these circumstances, it is perfectly clear that Stelmokas himself demonstrates that he made a material misrepresentation when he sought displaced person status and a visa. Surely the misrepresentation that Stelmokas was a teacher was material because it hid his true employment as a *Schutzmannschaft* officer.

Notwithstanding Stelmokas's failure to mount a substantial attack on the court's findings, we focus on two aspects of the government's case: Stelmokas's participation in the *Schutzmannschaft* as a movement hostile to the United States and his false statements to the DPC analyst and to the vice-consul. As we indicated, section 13 of the DPA prohibited issuance of a visa to any person "who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States." 62 Stat. 1014. It is beyond doubt that Stelmokas was an

officer in the *Schutzmannschaft*. It is also clear that the Lithuanian *Schutzmannschaft* was on the State Department "List of Organizations Considered Inimical to the United States." The inimical list states that members of the *Schutzmannschaft* "are considered collaborators except for those members . . . who can produce evidence that they were conscripted and did not commit atrocities or otherwise persecute civilian populations." *See* exhibit 4.242, app. 1672.

Stelmokas did not produce any such evidence. Indeed, except for a small number of exhibits, he did not produce any evidence at all. It is clear that Stelmokas voluntarily joined the *Schutzmannschaft* and, while there is no eye-witness testimony identifying him as a person who committed atrocities or otherwise persecuted the civilian population, the only reasonable inference to be drawn from the record is that he did exactly that. In any event, with or without the reasonable inferences to be drawn from the record, Stelmokas's service as an officer in the *Schutzmannschaft* disqualified him from obtaining displaced person status and a visa, as the *Schutzmannschaft* was a movement hostile to the United States. *See United States v. Kowalchuk*, 773 F.2d at 497 n. 11; *United States v. Koziy*, 540 F.Supp. at 34; *United States v. Osidach*, 513 F.Supp. at 78-79.

In his post-argument brief, Stelmokas makes disturbing contentions with respect to the inimical list. He indicates that "there is no evidence of record as to what, if any [inimical] list, was in use in July and August of 1949 when [he] made his applications to the [DPC] and the consulate." He then adds that the "government has placed the so-called inimical list in evidence but it is undated and there is no testimony as to when it was published and whether the Lithuanian *Schutzmannschaft* was on the list as early as the summer of 1949, and if so, what effect it

might have had, if any, on the decision of the DPC examiner or vice consul." Br. at 22.

While we agree that there was no testimony at trial as to what effect the presence of the *Schutzmannschaft* on the inimical list might have had on the decisions of the examiner or the vice-consul, we regard the balance of the quoted statements in Stelmokas's brief as material misrepresentations. Near the end of the trial, after the government's witnesses had testified and shortly before the government rested, the following proceedings took place:

> THE COURT: Fine. What remains to be done today?
>
> MS. SLAVIN [the government attorney]: Well, we would like to move Exhibit 4.242, which is the inimical list, into evidence. We have reached a stipulation.
>
> THE COURT: Let me . . .
>
> (Pause in proceedings.)
>
> THE COURT: Okay. It was not received yesterday. Is it being received —
>
> MS. SLAVIN: We are moving it in —
>
> THE COURT: — in evidence by agreement or is there a stipulation that you want to read into the record?

Appendix B

> MS. SLAVIN: The stipulation we have arrived at that was — that the list was in effect during the relevant period of Mr. Stelmokas' immigration in 1949.
>
> MR. CARROLL [Stelmokas's attorney]: And I'm withdrawing my objection to that exhibit, your Honor, for that reason.
>
> THE COURT: Exhibit 4.242 will be received in evidence.
>
> (Government Exhibit 4.242 is admitted into evidence.)

In the circumstances, it obviously is disingenuous for Stelmokas's attorney on this appeal, who was trial counsel as well, to challenge the use of the inimical list on the theory that the evidence did not show it was in effect when Stelmokas sought displaced person status and a visa. Of course, Exhibit 4.242 included the Lithuanian *Schutzmannschaft* on the list.

In any event, it would not matter if the *Schutzmannschaft* was added to the inimical list after Stelmokas obtained displaced person status and a visa and entered the country. Stelmokas was barred from entering the country because he was a member of the *Schutzmannschaft* which was a movement hostile to the United States. The date that the *Schutzmannschaft* was placed on the inimical list is not significant for purposes of determining if it was a movement hostile to the United States because its placement on the list established that it was such a movement during World War II when Stelmokas was one of its officers. The inimical list did not operate prospectively so that a movement

would be regarded as hostile to the United States only after it was placed on the list. After all, the list enumerated movements that existed during the Nazi era which ended before the list's promulgation. Therefore, Stelmokas was unlawfully admitted to the United States because, regardless of when the *Schutzmannschaft* first appeared on the inimical list, when Stelmokas served as a *Schutzmannschaft* officer it was a movement hostile to the United States.

The second aspect of the evidence on which we comment is Stelmokas' misrepresentations to the DPC analyst and the American vice-consul in Hamburg. Neither the analyst nor the vice-consul testified, but it is beyond dispute that when they interviewed Stelmokas he told them nothing about his *Schutzmannschaft* and *Luftwaffe* service. Rather, he told them that during the war he was a teacher in Seda, Lithuania, and was then a laborer in Dresden, Germany. There simply can be no doubt but that the district court's findings demonstrate that Stelmokas was not eligible to immigrate to the United States.

D. *The materiality of Stelmokas's misrepresentation*

Stelmokas's final argument is that the government did not establish that his misrepresentations regarding his wartime employment and residence were material. He contends that the "government has usually attempted [to establish] proof of materiality in these cases by calling consular or INS officials to testify that their decisions would have been different if they had known the truth." Br. at 48. *See, e.g., United States v. Kowalchuk,* 773 F.2d at 496. He then correctly points out that the government did not present any such evidence in this case.

Stelmokas's claim for relief on this basis faces the insurmountable barrier that even if he is correct, we still must

affirm. The district court found for six different reasons, all fully supported by evidence in the record, that Stelmokas was ineligible for displaced person status and for a visa and thus that he had not entered the United States lawfully and had not been eligible for citizenship. Five of these reasons were predicated on his conduct and associations during World War II, and only one was based on his misrepresentations to the DPC analyst and the vice-consul. Thus, even if Stelmokas had made no misrepresentations to the DPC analyst or the vice-consul, we would affirm because he procured his citizenship illegally as he was not eligible for displaced person status and for a visa.

We recognize that a party might contend that if a court of appeals rejected any of the bases for a district court's conclusion that a defendant should be denaturalized, it should remand the case so that the district court then could consider whether to grant relief predicated on the findings the court of appeals has upheld. In that event, a finding that a defendant had not made material misrepresentations in connection with his visa application could be significant. The problem with such an argument is that the courts do not have equitable discretion to deny the government a judgment of denaturalization to which it otherwise would be entitled. *Fedorenko,* 449 U.S. at 517-18, 101 S.Ct. at 752-53. Thus, even if we held that Stelmokas's misrepresentations were not material and, indeed, even if he made no representations at all to obtain the visa, his appeal is doomed, as he was not eligible for a visa, and we must uphold the district court even if we sustain only one of the bases for its conclusion that he had been, ineligible to enter the United States. Of course, we are sustaining the district court's conclusions on all six counts that Stelmokas was ineligible to enter the United States. Nevertheless, we will address the materiality argument on its merits, as it does relate to one of the bases for relief.

Appendix B

Initially, on this appeal Stelmokas and the government agreed that *Kungys v. United States*, 485 U.S. 759, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988), set the standard for materiality in this case, even though that case concerned materiality in citizenship applications under the INA, 8 U.S.C. § 1451(a), rather than materiality under section 10 of the DPA. Thus, in his opening brief, Stelmokas said that the "current test of materiality is found in *Kungys*." Br. at 47. Indeed, in his "Statement of Issues" he included the following: "Were the defendant's misrepresentations concerning his former occupation and residence 'material' as defined in *Kungys v. United States*, 485 U.S. 759, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988)." Under *Kungys*, a misrepresentation is material if it has a natural tendency to affect the officers' decisions, in this case the decisions of the DPC analyst and the vice-consul. 485 U.S. at 770-72, 108 S.Ct. at 1546-47. Furthermore, it is clear from *Kungys* that a misrepresentation can be material even where if the truth had been told, the decision maker ultimately would have reached the same result. Under *Kungys*, the materiality of a misrepresentation in a denaturalization proceeding is a legal rather than a factual question. *Id.* at 772, 108 S.Ct. at 1547.

While the government continues to rely on *Kungys*, Stelmokas changed his position in his post-argument brief in which he now contends that "*Kungys* simply did not deal with the visa or DPA issues." Br. at 1. Furthermore, he cites *United States v. Gaudin*, __ U.S.__, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), for the first time on this appeal in that brief, pointing out that the Supreme Court held there that materiality was a factual rather than a legal matter in the circumstances of that case. We would be justified in refusing to entertain Stelmokas's post-argument change in position, for we do not think that a party should be able to change his legal contentions after oral

argument. But, mindful of the importance of this case to Stelmokas, we nonetheless will discuss his new position.

While we cannot predict the ultimate implications of *Gaudin*, we do know that *Gaudin* did not affect the *Kungys* holding that, in a denaturalization proceeding, materiality of a misrepresentation is a legal issue. Quite the contrary is true because the *Gaudin* court discussed *Kungys* at length and made it clear that it was distinguishing *Kungys* because that case dealt with whether "an appellate court must remand to a district court for a determination of materiality in a denaturalization proceeding," whereas *Gaudin* was concerned with a defendant's Sixth Amendment right to have a jury determine materiality in a criminal proceeding. *Gaudin*, __ U.S. at __, 115 S.Ct. at 2319.

Of course, *Gaudin* followed a familiar track because it is not unusual for the Court to extend more extensive procedural protections to a defendant in a criminal case than to a party in a civil case. Indeed, as we point out above, the Court in *Baxter v. Palmigiano* distinguished *Griffin v. California* on the ground that *Griffin*, unlike *Baxter*, was a criminal case. *Baxter*, 425 U.S. at 317, 96 S.Ct. at 1557. Thus, while *Gaudin* may cause courts to cabin *Kungy's* to the extent that it holds that a determination of materiality is a legal issue, *Kungys's* treatment of materiality as a legal issue remains applicable here.

Stelmokas now also seems to contend that because the procedure in an application for citizenship differs from that under section 10 of the DPA, the definition of what is material in *Kungys* is inapplicable here. In particular, in his post-argument brief, he contends that "*Kungys* simply did not deal with the visa or DPA eligibility issues." Br. at 1. This argument is distinct from Stelmokas's contention that materiality is a factual question.

We reject this attempt to distinguish *Kungys*. While the procedures followed and questions asked when an applicant seeks a visa differ from those applicable when an applicant seeks citizenship, we see no reason why the test of materiality under *Kungys* would not apply in DPA eligibility cases. Materiality, after all, refers to the effect of a representation on a decision maker regardless of the nature of the decision. In other words, no matter what is being decided, the misrepresentation is material under *Kungys* if it has the natural tendency to affect the decision. We see no reason not to apply that test here. Thus, *Kungys* is doubly significant here, for it establishes that the resolution of materiality is a legal undertaking and it sets forth the test of what is material.

Inasmuch as under *Kungys* the materiality of a misrepresentation in a denaturalization proceeding is a matter of law, not fact, there cannot possibly be a need for the government to produce evidence from officials that if the truth had been told the officers would have reached a different result. *Kungys*, 485 U.S. at 772, 108 S.Ct. at 1547. After all, evidence is not needed for a court to make a legal determination. Thus, while the government frequently has produced evidence of that character, the effect of *Kungys* in 1988 has been to eliminate the need for such evidence, if it ever was required.

We do not go so far as to suggest that evidence of what a consular or DPC official would have done if given the correct information is not admissible because we have no need to reach that point. Indeed, we even will assume that in a close case evidence of that character would be useful for the court in making a legal determination concerning the materiality of a misrepresentation. After all, the Supreme Court, prior to *Kungys* in *Fedorenko v. United States*, quoted and relied on such evidence

produced by the government, though it noted that it was proffered and accepted by the court "[w]ithout objection" from the defendant. 449 U.S. at 498-501, 101 S.Ct. at 743-44. Yet, in *Fedorenko* the court did say that the defendant was ineligible for a visa "as a matter of law." *Fedorenko*, 449 U.S. at 509, 101 S.Ct. at 749.

Though we thus acknowledge that in a close case evidence of whether or not the consular official's decision would have been different if he knew the truth might be helpful to the court in deciding a materiality issue, this case is not close. In our view, it cannot reasonably be argued that Stelmokas's misrepresentation that he was a laborer and a school teacher when in fact he was an officer in the *Schutzmannschaft* and served in the *Luftwaffe* could not have had a natural tendency to influence the DPC analyst and the vice-consul. Indeed, probably without recognizing the implications of his statement, Stelmokas admits as much, for in his post-argument brief he describes his fabricated wartime employment as a "neutral" factor in the decision to admit him to the United States. Br. at 3. He hardly could contend that a revelation of his real *Schutzmannschaft* and *Luftwaffe* service would have amounted to the disclosure of a "neutral" factor.

We have no doubt that if Stelmokas had told the truth about his service on behalf of Germany during World War II he never would have obtained his visa for permanent residency in the United States, and he never would have been naturalized. After all, we have found that these activities disqualified him from securing displaced person status and from obtaining a visa. Thus, the misrepesentations surely were material. Of course, there is a certain irony in Stelmokas's contention that his misrepresentations were not material, because when he made

them he must have recognized the need to hide the ruth so that he could be admitted to this country. At least we can discern no other motive that he might have had to conceal his wartime activities. The truth is inescapable: he invented his wartime history out of thin air so that he could be admitted to the United States and ultimately obtain citizenship.

We make an additional observation with respect to the custom of the government of calling consular or INS officials to testify that their decisions would have been different if they had known the truth. As we have indicated, Stelmokas seems to believe that the materiality of a misrepresentation is a factual issue and reasons that the fact of materiality cannot be established without testimony as to what the consequence of the provision of truthful information to the decision maker would have been. Yet, even treating materiality as a factual question, we see no reason why the district court as the trier of the fact could not conclude, without such testimony, that the misrepresentation had a natural tendency to affect the decision and thus was material. We will not convert the government's custom in producing consular or INS testimony to establish the materiality of a misrepresentation into a requirement that it must do so, for we are not aware of any case which holds that the government must establish the materiality of a misrepresentation with testimony from a consular or INS officer that a truthful disclosure would have produced a different result.

We point out that our conclusion that evidence on materiality of a misrepresentation is not necessary is in harmony with our treatment of materiality in other contexts. *Bethel v. McAllister Bros., Inc.*, 81 F.3d 376 (3d Cir.1996), is a recent example. In *Bethel,* the plaintiff obtained a substantial verdict on a defamation claim. Subsequently, the defendant moved for relief from the judgment entered on the verdict based on the plaintiffs testimony

at an arbitration proceeding after the trial in the defamation case which was inconsistent with his earlier testimony at trial. The district court granted relief and ordered a new trial on the defamation action. The plaintiff appealed, and we affirmed.

Bethel is significant to this case because the district court and this court in *Bethel* were concerned with whether the "misrepresentation" was "material" to the plaintiff's case. *Id.* at 385. We held that it was not merely material, it was crucial. In entertaining the motion for relief from judgment, the district court developed a record establishing the misrepresentation by comparing the testimony at the trial and the arbitration. But no witness testified that the misrepresentation was material. Rather, the district court, predicated on its own view of the record, concluded that it was material, and we reached the same conclusion using an identical methodology. Thus, without citing *Kungys* both courts in *Bethel* followed the *Kungys* formula of basing a determination of "the materiality of a statement . . . upon a factual evidentiary showing" and then making "an interpretation of substantive law." *Kungys*, 485 U.S. at 772, 108 S.Ct. at 1547 (omitting citation). That procedure is exactly what the district court did here, and it is exactly what we do on this appeal. In fact, materiality frequently is treated as a legal question, sometimes in a trial context as in *Kungys*, *see In re Cohn*, 54 F.3d 1108, 1115 (3d Cir. 1995), and sometimes in other proceedings. *See, e.g., United States v. Pelullo*, 14 F.3d 881, 886 (3d Cir.1994); *United States v. Gray*, 878 F.2d 702, 714 (3d Cir.1989).

E. *Comments on the dissent*

We close the discussion portion of our opinion with comment on two aspects of Judge Aldisert's dissent, sections VII and VIII.

Appendix B

We do not address the rest of the dissent as our opinion adequately explains the bases for our conclusions and we do not regard the dissent as detracting from them. We comment on his discussion in section VII of the dissent on Count IV of the complaint in which the government charged that Stelmokas illegally procured his naturalization because he misrepresented his wartime record to the DPC and to the vice-consul and thus was ineligible to enter the country. We focus our attention on this point because Judge Aldisert includes in his dissent a concession which causes the dissent to self-destruct, namely "that Stelmokas' failure to disclose his wartime military status would have had a natural tendency to influence immigration decisions." Dissent typescript at 29.

Initially on this point we reiterate that 8 U.S.C. § 1451(a) provides in the disjunctive for a certificate of naturalization to be revoked if it was "illegally procured" or was "procured by concealment of a material fact or by willful misrepresentation." In an "illegally procured" case, the alien obtains his naturalization illegally, in this case the illegality being that Stelmokas was not eligible for naturalization as he was not admissible into the United States. In a "procured by" case, the alien obtains his naturalization by concealment off material fact or by misrepresentation. While Judge Aldisert asserts that the government attempted in Count IV to rely on the "procured by" language, in that count the references to Stelmokas's misrepresentations to the DPC analyst and the vice-counsel were germane only to the "illegally procured" component of section 1451(a). Thus, Judge Aldisert's suggestion that Count IV of the complaint related in any way to the "procured by" language of section 1451(a) is simply not true. Furthermore, while the government unsuccessfully did use Stelmokas's misrepresentations to the DPC analyst and the vice-consul in

the only count of its complaint asserting a "procured by" charge, Count VII, the government does not pursue its case on that count on this appeal.

Judge Aldisert then indicates, quite correctly, that the government's case on Count IV begins with the major premises that DPA § 10, 62 Stat. 1013, barred from immigration any person who willfully misrepresented material facts to gain entry as a displaced person. He then correctly indicates that the government argues that Stelmokas made material misrepresentations so that his entry was unlawful and he thus illegally procured his naturalization. He then indicates that the "critical inquiry is whether the government met its important *threshold* burden of proving a misrepresentation as defined in the Displaced Persons Act." Dissent typescript At 27. (Emphasis added.)

The problem with the foregoing statement is inclusion of the word "threshold" for if the government established that Stelmokas made material misrepresentations to the DPC analyst and the vice-consul the case is over and the government wins. Why is this so? The answer is quite clear. DPA § 10 provides that any "person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Of course, as we already have explained, that person is thus ineligible for naturalization.

Rather, as Judge Aldisert acknowledges, the test of materiality comes from *Kungys, i.e.*, does the misrepresentation have a natural tendency to influence or was it capable of influencing the decision of the decision making body to which it was addressed? While it appears that Judge Aldisert is reluctant to acknowledge that Stelmokas's lies to the DPC analyst and the

vice-consul about his wartime activities were material, we reiterate that he does concede "that Stelmokas' failure to disclose his wartime military status would have had a natural tendency to influence immigration decisions." Dissent typescript at 29. Under *Kungys* the misrepresentations were therefore material without any showing of their effect on the DPC analyst or the vice-consul.[1]

Notwithstanding the clear statutory scheme, Judge Aldisert either tries to add more elements to the definition of materiality or to demonstrate that the government had to show that the misrepresentations led to Stelmokas's admission into the country. As we have indicated, the government has demonstrated the Stelmokas's misrepresentations led to his admission into the United States but it did not have to do so. Nevertheless we address the point Judge Aldisert makes. Judge Aldisert fails in this effort

---

1. Moreover, the Supreme Court made clear in *Fedorenko v. United States* that a certificate of naturalization is "illegally procured" whenever the naturalized citizen failed to comply with a statutory prerequisite for naturalization at the time that he procured his citizenship. Once the absence of a statutory prerequisite has been shown, no causation element need be proved. *Fedorenko v. United States*, 449 U.S. at 514, 101 S.Ct. at 751 ("[O]ur cases have established that a naturalized citizen's failure to comply with the statutory prerequisites for naturalization renders his certificate of citizenship revocable as 'illegally procured' under 8 U.S.C. § 1451(a)."); *id.* at 515, 101 S.Ct. at 752 ("[I]nasmuch as petitioner failed to satisfy a statutory requirement which Congress has imposed as a prerequisite to the acquisition of citizenship by naturalization, . . . petitioner's citizenship must be revoked because it was 'illegally procured.' "). Thus, once the Government proved that Stelmokas was not "lawfully admitted" to the United States under the DPA because his misrepresentations, regardless of their effect, made him "thereafter not . . . admissible," DPA § 10, Stelmokas's certificate of naturalization was "revocable as 'illegally procured.' " *Id.* at 514, 101 S.Ct. at 751.

to demonstrate that the government had to demonstrate anything beyond the conceded fact that Stelmokas's misrepresentations had a natural tendency to influence the immigration decisions. The reason he fails is that he relies on principles inapplicable in a case under the "illegally procured" clause of section 1451(a) when the case is predicated, as is this case in Count IV, on an alien having made a material misrepresentation under DPA § 10 for the purpose of gaining admission into the United States. Thus, Judge Aldisert makes the following statement which is simply wrong in this "illegally procured" case under section 1451(a): "In denaturalization cases, equally important to establishing a material statement is the presentation of evidence that the misrepresentation procured the order and certificate of naturalization." Dissent typescript at 29. The problem with the statement is that in "illegally procured" cases there is no requirement that a misrepresentation enabled the alien to procure anything. Rather, in an illegally procured case dependent on a misrepresentation made when the alien sought admission into the United States, under DPA § 10 the government merely need prove that the misrepresentation for the purpose of obtaining admission into the United States was material. Furthermore, Judge Aldisert's statement is wrong for the additional reason that Stelmokas did not make his misrepresentations to procure the order and certificate of naturalization. He made them to obtain displaced person status and to be admitted into the United States.

We reiterate that Stelmokas's misrepresentations to the DPC analyst and the vice-consul are significant because under DPA § 10 an alien who makes a material misrepresentation thereafter is not admissible into the United States. Thus, if an alien who made a material misrepresentation is admitted and is naturalized, he has illegally procured his naturalization without regard for whether he procured anything by the misrepresentation. We

further emphasize that DPA § 10 in the clearest possible terms speaks prospectively, *i.e.*, "thereafter" an alien making misrepresentations is not admissible into the United States. Accordingly, it is clear beyond doubt that once Stelmokas made his misrepresentations to the DPC analyst and the vice-consul, he was ineligible to enter the United States, because, in Judge Aldisert's words, his "failure to disclose his wartime military status would have had a natural tendency to influence immigration decisions." Accordingly, Stelmokas could not be naturalized and he illegally procured his citizenship. Nothing in DPA § 10 requires that the alien procure his admission into the United States or anything else by his misrepresentations for even if the misrepresentations are uncovered immediately, so that the alien does not obtain displaced persons status or is not admitted to the United States, he is ineligible for admission to the United States after he makes his misrepresentations.

For reasons that must be driven by Judge Aldisert's sense that there is something unfair in the prosecution of this case he continues to develop his dissent along the same erroneous lines that we have described. Thus, he points out that in *Kungys* "the government was obligated to demonstrate that Kungys' citizenship status was procured by his material misrepresentations." Dissent at 338. He then inferentially acknowledges that *Kungys* was not an "illegally procured" case but was a case where the naturalization was "procured by concealment of a material fact or by willful misrepresentation," for he recites that the "Government seems to ask this court to apply different meanings to the term 'procured' in the two clauses of § 1451(a)." *Id.* at 338. He argues that "[t]here is no rational support for the suggestion that Congress intended such an anomalistic reading of the same word in the same section of the same statute. There is absolutely no rational support for the

notion that the government is not required to produce evidence showing precisely how Stelmokas was '*unlawfully* admitted' and whether his naturalization was in fact 'illegally procured.' " *Id.* at 338. "If under the second clause in § 1451 the government must show that the naturalization was 'procured by' the alleged misrepresentation, as the Court held in *Kungys,* then under the first clause certainly the government must demonstrate that Stelmokas was ineligible and therefore unlawfully admitted." *Id.* at 338-39.

The problem with the foregoing quoted language from the dissent is obvious. The government did demonstrate, in Judge Aldisert's words, that Stelmokas "was ineligible and therefore unlawfully admitted." The government demonstrated that Stelmokas made a material misrepresentation under DPA § 10, which representation we once again point out did not have to result in Stelmokas procuring anything to violate that section. Thus, Stelmokas illegally procured his naturalization. Nothing could be clearer.

It is also clear that in the "illegally procured" and "procured by" clauses, "procured" has the same meaning and the government does not contend otherwise. We repeat the distinction between the two types of cases. In a "procured by" case the alien obtains his naturalization by his misrepresentation. In an "illegally procured" case the alien obtains his naturalization illegally, in Stelmokas's case by entering the country when he could not be admitted. Thus, "procured" means the same thing in "illegally procured" and "procured by" cases. What differs is the interdicted conduct by which the alien procured his naturalization.[2]

---

2. *See Kungys,* 485 U.S. at 800 n. 11, 108 S.Ct. at 1561 n. 11 (Stevens, J., concurring in judgment) ("Although the illegally-procured provision [of

(Cont'd)

Of course, there is a good reason why the "procured by" clause in section 1451(a) requires that the government demonstrate more than that an alien made a material misrepresentation for naturalization to be revoked because, unlike DPA § 10 which applies prospectively so as to render an alien inadmissible to the United States, section 1451(a) always applies in a situation in which the alien already has procured his naturalization. Thus, Judge Aldisert's emphasized quotation of *Kungys* that "the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment," 485 U.S. at 767, 108 S.Ct. at 1544, dissent at 339, does not support his position because there the Court was discussing a "procured by" not an "illegally procured" case. Judge Aldisert goes further in misusing the plain language of *Kungys*. First, he correctly says that *Kungys* indicates that in a denaturalization proceeding there are "four independent requirements." Dissent at 339. In fact, the Court said the following with respect to a "procured by" case under section 1451(a):

> So understood, the provision plainly contains four independent requirements: the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment must have been willful, the fact must have been material, and the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment.

Kungys, 485 U.S. at 767, 108 S.Ct. at 1544-45.

(Cont'd)

section 1451(a)] may reach some conduct encompassed within the material misrepresentation provision, the illegally-procured provision has an independent and broader reach.").

Yet this language does not help Stelmokas for in the quotation the Court was not discussing an "illegally procured" case. Rather, it set forth the elements of a "procured by" case. Furthermore, the Court emphasized that the requirements were "independent." Thus, it is impossible to read the statement in *Kungys* that the naturalized citizen have procured citizenship as a result of the misrepresentation into the materiality requirement of a misrepresentation under DPA § 10. The materiality and procurement considerations are "independent" of each other and cannot be fused. Furthermore, the requirement in a "procured by" case that the representation have resulted in the alien obtaining citizenship cannot be attached to the government's burden to show that Stelmokas's misrepresentations to obtain displaced person status and a visa in this "illegally procured" case were material. Thus, Judge Aldisert's concession that Stelmokas's misrepresentations would have had a natural tendency to influence the immigration decisions should lead him to vote to affirm even if he rejects, as he does, the rest of the government's case, for as we explained above, if the government establishes that Stelmokas illegally procured his naturalization for a single reason we must affirm the district court.

Judge Aldisert discusses the possibility of the government producing evidence of what consular officials would have done if Stelmokas had not deceived them but we will not discuss this point as we have addressed it above. Eventually he gets back to his central theme on Count IV but at that point he inexplicably compounds his errors for he says that "the government has not met its high burden of proof in this case because it failed to produce evidence that Stelmokas' misrepresentations procured the decision of the DPC analyst and the *naturalization officials.*" Dissent at 341. (Emphasis added.) Of course, the "naturalization officials" have nothing to do with this case on Count IV and

thus the government does not contend that any misrepresentation to them is germane to that count. Furthermore, the government did not have to show that Stelmokas's misrepresentations to the DPC analyst and the vice-consul procured the decision of the naturalization officials to grant naturalization as the misrepresentations were critical as they led to his admission into the United States.

The second aspect of Judge Aldisert's dissent on which we comment is part VIII in which he expresses due process and fairness concerns. We point out that Stelmokas does not contend that the prosecution of the case has denied him due process of law. Accordingly, this court should not be concerned with Judge Aldisert's observation that with the passage of time "witnesses disappear and memories fade." Dissent at 343. In any event, lest too many tears be shed for Stelmokas, we point out that one witness has not disappeared and we have no reason to believe his memory has faded. That witness, of course, is Stelmokas himself who with so much at stake persisted in his plea of the privilege against self-incrimination notwithstanding the order of the district court overruling the plea.

III. CONCLUSION

After a careful examination of this matter, we have concluded that the district court made no errors of law and that the record fully supports and, in fact, compels the district court's conclusion that Stelmokas did not qualify for admission to this country as a displaced person. Thus the district court correctly revoked his citizenship and ordered him to surrender his certificate of naturalization. While many years have passed since his admission to the country and his obtaining of citizenship, it is not too late to remedy the wrong done when he was admitted. Accordingly, we will affirm the judgment of August 2, 1995.

Appendix B

STAPLETON, Circuit Judge, concurring:

I feel compelled to write separately because an accusation of personal participation in the atrocities of the Holocaust is a grave matter, and a judicial finding of such participation understandably carries with it extrajudicial, collateral consequences unrelated to citizenship and deportability. While I agree with the court that the government has carried its burden on six counts of its complaint,[1] I conclude that the evidence of Stelmokas' participation in the *Grosse Aktion* (Great Action) is not clear, convincing and unequivocal, and that the district court clearly erred in finding otherwise.

To be sure, there is substantial evidence that Stelmokas was a member of a platoon of the 3rd Company of the 3rd Battalion of the Lithuanian Schutzmannschaft and was not on leave on the date of the Great Action. Moreover, there is substantive evidence that Lithuanians in military uniforms aided the Germans in the mass execution. It is a matter of speculation, however, whether all, some or none of Stelmokas's Schutzmannschaft Battalion participated.

On October 28-29, 1941, German troops, aided by "Lithuanian partisans," conducted an operation they referred to as the Great Action which resulted in the execution of 9,200 Jews from the ghetto in Vilijampole. On the morning of October

---

1. Although I conclude that the evidence of Stelmokas' participation in the *Grosse Aktion* is not sufficient, I would affirm the judgment on Count I of the complaint. The district court found both his service as commander of the ghetto guard and his participation in the *Grosse Aktion* to be independently sufficient bases for concluding that he assisted in the persecution of civilian populations. Because his guard duty is a sufficient basis for revoking citizenship, I would affirm on Count I.

28, the Jews were lined up by the Jewish Ghetto Police, and the Germans culled out those who were and were not fit to work. Those not fit to work were marched to the "small ghetto," which was adjacent to Vilijampole, and the next day they were marched, in groups of five hundred at a time, to Fort IX and executed. They were buried in mass graves dug by Soviet prisoners of war. Two survivors from Vilijampole testified that they saw Lithuanians in military uniforms aid the Germans in the Great Action, but they did not identify whether the men were from Stelmokas's Schutzmannschaft Battalion or from some other Lithuanian group.

No testimony and no documentary evidence directly links Stelmokas or the 3rd Battalion to the Great Action. The district court, in finding participation by Stelmokas, relied largely on the opinion of Dr. Raul Hilberg that the entire 3rd Battalion must have participated in the Great Action. Dr. Hilberg's opinion was based almost entirely on two observations. First, he had "seen documents in which larger forces than one battalion were deployed to kill fewer than 10,000 people." App. at 411. From this, he inferred that in addition to the personnel of the Einsatzkommando 3, the German unit of security police which carried out the operation, at least 500 men, a full battalion, were required for the Great Action. He acknowledged, however, that the minimum number of men required would vary according to factors such as the terrain and the degree of resistance from the Jews. Second, there was a "shortage of manpower" because German and Lithuanian units stationed near Kaunas had been sent to fight the Soviets. Specifically, the majority of the German 11th Reserve Police Battalion and the entire 2d Lithuanian Battalion were in Byelorussia. Putting these two observations together, Dr. Hilberg concluded that Stelmokas's entire Battalion must have assisted in the Great Action. The balance of the 11th

Appendix B

Reserve Police Battalion and the ghetto police would not, in his opinion, be sufficient in the absence of the entire 3rd Battalion of the Lithuanian Schutzmannschaft.

I do not question in the least Dr. Hilberg's qualifications as an expert in Holocaust history, nor do I doubt the conviction with which he believes Stelmokas participated in the Great Action. Nevertheless, I cannot conclude that his observations, by themselves, clearly, convincingly and unequivocally demonstrate that Stelmokas aided the Germans in their massacre of October 28th and 29th. Dr. Hilberg believed a full battalion was required based on the number of men used in mass executions elsewhere about which he had read. He did not, however, describe the circumstances of the other mass executions and admitted that the minimum requirement would vary according to local conditions and the resistance level. He did not identify any local conditions that would have made the Great Action a particularly labor intensive operation and candidly acknowledged, based on contemporary documentation, that no Jewish resistance was anticipated. He also testified that it was reasonable to assume that some segment of the available manpower would have to have been assigned to the responsibilities that occupied the available troops on a day to day basis, *e.g.*, protection of facilities and communication and the maintenance of security. Given the uncertainty involved in estimating manpower needs based on other, perhaps dissimilar, situations and the reasonable assumption that there were competing manpower demands in the local area, it seems speculative to assert that the entire 3rd Battalion participated despite the presence of a portion of the 11th Reserve Police Battalion and the ghetto police.

My concern, however, is not grounded solely in the

sufficiency of Dr. Hilberg's testimony; as Stelmokas points out, the government's own evidence casts serious doubt on the inferences drawn by Dr. Hilberg. Certain documents suggest that a sizable contingent of Lithuanians not associated with the Sonderkommando was available to help in the Great Action, and that less than a full battalion of support troops may have been needed. To make my point, a little background regarding the organization of German police forces is helpful.

Following the occupation of Lithuania by the German Army, German occupation police moved in and kept order. One component of the German occupation police was the security police; the other component was the order police. The security police had mobile units called Einsatzgruppen, about the size of a battalion, and these were broken down into companies called Einsatzkommando and Sonderkommando. The Einsatzgruppen were in charge of exterminating Jews and other "undesirable" elements of the population. Einsatzgruppen A was assigned to Lithuania and other Baltic states, and its subdivision Einsatzkommando 3, commanded by Colonel Jaeger, operated in the area including Kaunas. The order police were much larger than the security police, and included the 11th Reserve Police Battalion mentioned by Dr. Hilberg.

A government exhibit indicates that in addition to Einsatzkommando 3, a sizable contingent of Sonderkommando was available in the Kaunas area. This exhibit, entitled "USSR Situation Report No. 19" and dated July 11,1941, was prepared for the Chief of Security Police and has a section devoted to the situation in Kaunas. In this section, the report states that "We have retained approximately 205 Lithuanian partisans as a Sonderkommando, sustained them and deployed them for executions as necessary even outside the area." App. at 1861.

Appendix B

The availability of nearly a half-battalion of Sonderkommando substantially undermines the conclusion that the entire 3rd Battalion of the Schutzmannschaft was necessary to carry out the Great Action.

In addition to this Situation Report No. 19, there is another contemporaneously prepared document that calls Dr. Hilberg's opinion into question. As I have noted, Colonel Jaeger commanded the Einsatzkommando 3, the unit of German security police assigned to the Kaunas area. Colonel Jaeger prepared a report, the Jaeger Report, which is dated December 10, 1941, and which refers to the Great Action and many other executions of Jews. Colonel Jaeger there wrote the following chilling lines:

> The goal to make Lithuania "Jew free" could only be attained through the formation of a mobile detachment with specially selected men under the leadership of SS Obersturmfuhrer Hamann who shared my goals completely and who would guarantee the cooperation of the Lithuanian partisans and the existing civil offices.

The carrying-out of such actions is, in the first place, a question of organization. . . . The Jews had to be collected in one or in several locations. Based on the numbers [of Jews] a place for the necessary pits had to be found and dug up. . . . The Jews were transported to the execution site in groups of 500 and in intervals of at least 2 km. What difficulties and nerve-racking work that had to be accomplished is shown in the following random example:

In Rokiskis, 3,208 people were to be transported 4½ km before they could be liquidated. In order to accomplish this work

in 24 hours, 60 of the 80 available Lithuanian partisans had to be detailed for transport duty and perimeter security. The remainder, who had to be repeatedly relieved, earned out the work with my men. . . . Attempts to escape that happened here and there were prevented entirely by my men and with some danger to their lives. . . . Only through skillfull use of time was it possible to carry out up to 5 actions in a week's time and to handle the work that had accumulated in Kaunas so that no bottlenecks occurred in the official functions.

> The actions in Kaunas itself, where there were sufficient reasonably well-trained partisans available, were virtually duck shoots compared with the enormous difficulties which were often encountered elsewhere.
>
> All leaders and men in my detachment in Kaunas took an active part in the major actions in Kaunas.

App. 1133-34.

Colonel Jaeger reports the executions of thousands of Jews and hundreds of others in such an impersonal, matter-of-fact manner and with such pride that his account leaves one in a horror-driven state of shock. Nevertheless, the Jaeger Report, as documentary evidence, is important in the present context for a number of reasons. First, in the context of a somewhat smaller but nevertheless substantial mass execution, it provides a contemporary estimate of the manpower necessary to perform the grizzly task of mass execution from a German official having responsibility for carrying out those executions. The report indicates that the mass execution of 3,208 people at Rokiskis was carried out by Einsatzkommando 3 personnel with the assistance of only 80 "Lithuanian partisans."

Appendix B

Second, while Rokiskis provides an example of a mass execution with "enormous difficulties," the execution of "2007 Jews, 2,920 Jewesses, and 4,273 Jewish children" in the course of the Great Action did not present comparable problems. App. at 1129.

Putting these two pieces of evidence together, even if one assumes that the number of potential victims in the Great Action would require substantially more support from "Lithuanian partisans" than was employed in Rokiskis, Dr. Hilberg's insistence that a minimum of 500, in addition to the Einsatzkommando 3 personnel, seems questionable, at least in the absence of more explanation than he was able to give.

Finally, the Lithuanian partisans who in fact participated in the Great Action are described as "reasonably well trained." When one puts this together with the U.S.S.R. Special Report 19's indication that approximately 205 Lithuanian partisans had been formed into a Sonderkommando company specifically to be "deployed . . . for executions as necessary," the most likely inference is that at least a large segment of the need for Lithuanian participants during the Great Action was met by Lithuanians who were not from the Schutzmannschaft 3rd Battalion. In suggesting that this is the likely inference, I am not unmindful of Dr. Hilberg's opinion that the reference to "reasonably well trained partisans" in the Jaeger Report meant Schutzmannschaft personnel. The basis for that opinion, in its entirety, is found in the following excerpt from his testimony:

> In this report, Jaeger is trying to impress his superiors. That's a very common phenomenon in reporting. And so he, first of all, calls attention to the difficulties and complexities of

> organizing such an operation. He refers to thorough preparation of each individual action and knowledge of the conditions in the area in question. . . .
>
> He then goes into some examples of towns and then, referring on top of page 30 of the English translation, he says that the actions encompass itself a little bit easier because there were well trained partisans, as he calls them. Now what he is referring to, of course, is the schutzmannschaft. And the reference to the training can be explained by the fact that right from the start [of the schutzmannschaft], June 28th, 1941, the call went out for volunteers who had military experience. In other words, these people knew how to fire a weapon, they knew how to hit their target. And for that reason, the operation was, in his view, like shooting at a parade. It was well coordinated and well done.

App. at 277, 277-78. Dr. Hilberg's inference is a plausible one. However, once one is aware that a group of Lithuanian partisans had been formed and were available specifically for this purpose, I believe another inference becomes the more plausible one.

I acknowledge that the inferences I suggest based on the Jaeger Report and Special Report No. 19 do not constitute clear, convincing and unequivocal evidence that Stelmokas did *not* participate in the Great Action. He may well have participated. It was the government's burden, however, to produce clear, convincing, and unequivocal evidence that dence that Stelmokas *did* participate. In my view, it did not come anywhere close to carrring that burden.

Appendix B

While the district court reached its conclusion about Stelmokas's participation in the Great Action without reference to his failure to testify at the trial, it noted that it believed an inference could appropriately be drawn from that failure which confirmed its conclusion. I agree with the district court that the Fifth Amendment did not foreclose it from drawing a negative inference from Stelmokas's failure to explain what he was doing on October 28 and 29, 1941. As the Supreme Court cautioned in *Baxter.v. Palmigiano,* 425 U.S. 308, 318, 96 S.Ct. 1551, 1557-58, 47 L.Ed.2d 810 (1976), however, a party's silence should not be given "more evidentiary value than [is] warranted by the facts surrounding [the] case." Here, Stelmokas stands accused of a number of different forms of conduct, any one of which would warrant the revocation of his citizenship. If Stelmokas had taken the stand and denied participation in the Great Action, he would have subjected himself to cross-examination that almost certainly would have established another ground for revocation. Under these circumstances, I do not believe any appropriate, negative inference from silence can boost Dr. Hilberg's speculative opinion into the realm of clear, convincing and unequivocal evidence.

Finally, I turn to the dissent's conclusion that there is insufficient evidence to support the district court's finding regarding Stelmokas's guarding of the Vilijampole ghetto. In contrast to the state of the record regarding Stelmokas's participation in the Great Action, I find the evidence supporting this finding to be clear, convincing, and unequivocal.

The finding at issue reads as follows:

> The Court finds that the Government has not established by clear, unequivocal, and

convincing evidence that the shootings on September 16-17, 1941 were carried out by either the defendant or Schutzmannschaft members under his command. However, the Government has established by clear, unequivocal, and convincing evidence that defendant was commander of the ghetto guard for a 24-hour period commencing September 16, 1941, at 1 p.m., that Jews in the ghetto were subject to extreme deprivation, brutality, and arbitrary shootings during that period, and that defendant was responsible for enforcing the confinement of Jews in such conditions.

On September 1,1941, Stelmokas's Battalion Commander entered the following order:

TO THE 3rd AUXILIARY POLICE SERVICE BATTALION

Order Number 1, Secret

Kaunas, 1 September 1941

Operations Section

§ 1.

I announce the Battalion's schedule of guard deployments and positions:

Appendix B

Guard Post Number	Guard duties	Guard place of assignment	Number on Duty	Purpose
3	Guard at the captured ammunition warehouse	Vilijampole, VIII Fort	4	To guard the ammunition warehouse
21	"Ghetto guard"	Vilijampole, Veliuonos street 17	32	Not to let a single Jew out of the closed quarter

Two weeks later, on September 15, 1941, the same Battalion Commander entered another order, section 1 of which made the following duty assignments:

> Security and service duties for 16 September of the current year:
>
> Battalion Duty Officer Junior Lieutenant TAMULAITIS, VYTAUTAS
>
> Assistant to the Duty Officer — Corporal KVARACIEJUS
>
> Duty Clerk at the Battalion Headquarters — Corporate AUKSORAITIS
>
> Guard Commander in Vilijampole — Junior Lieutenant STELMOKAS
>
> Guards from the 3rd Company

Appendix B

While this order was lengthy and dealt with a variety of subjects, these were the only current duty assignments recorded.

The record discloses that the ghetto was located in a section of the city called "Vilijampole" and that "Vilijampole" was frequently used as a synonym for the ghetto. As Stelmokas stresses, the record also indicated, however, that Fort VIII, while in the area called Vilijampole, was not in the ghetto. Based on this evidence, Stelmokas suggests that the order assigning him as "Guard Commander in Vilijampole" is ambiguous — that the assignment might have been merely to guard ammunition at Fort VIII.

While I agree with Stelmokas that the government had the burden of proving Stelmokas's participation in the persecution of Jews by clear, convincing and unequivocal evidence, his suggestion of a significant ambiguity in the record is unpersuasive. Dr. Hilberg and the September 1st order itself indicate that in the context of guard duty, the words "Fort VIII" were generally included in the designation of that guard post in order to distinguish duty there from the duty of guarding the ghetto. More importantly, Stelmokas commanded a platoon consisting of something over 30 men and it is far more likely that he was given responsibility for Guard Post 21 or both Guard Posts 21 and 3, than that he commanded only the four guards at Fort VIII. Finally, and most importantly, the September 15th order reports only two command assignments: the "Battalion Duty Officer" and the "Guard Commander at Vilijampole." The suggestion that this order would record the identity of the commander of a four man unit at Fort VIII and omit entirely any mention of the Guard Commander of the ghetto strikes me as too far fetched to raise even a reasonable doubt.

Appendix B

ALDISERT, Circuit Judge, dissenting:

Again we are faced with a denaturalization proceeding brought by the Office of Special Investigations (OSI) against an American octogenarian for events that took place during the Nazi occupation of Europe more than 50 years ago. Although stripping an American of his citizenship is a civil proceeding, the effect is so drastic that the government's burden is "substantially identical with that required in criminal cases — proof beyond a reasonable doubt." *Klapprott v. United States,* 335 U.S. 601, 611-612, 69 S.Ct. 384, 389, 93 L.Ed. 1099 (1949).

The predicate acts that form the basis of OSI prosecutions take place in the midst of what must be acknowledged to be the most craven and pusillanimous crime ever sponsored by a nation — the Holocaust effectuated by the German Third Reich in the 1930s and 1940s. This case is no exception.

The inhumane Nazi brutality that underlies these cases makes especially arduous our obligation to require the government's high burden of proof, but the law commands that we do just that, and rightly so. Indeed, faced with a backdrop of such monstrous and inhuman past behavior, a court's responsibility in 1996 to insure the maximum protection of the law constitutes America's best response to the Nazi juggernaut that crushed all semblance of justice and freedom, and millions of innocent lives a half century ago.

The district court revoked the citizenship of Jonas Stelmokas because he joined and served in the Lithuanian 3rd Auxiliary Police Service Battalion in 1941. At the time, he was a 25-year-old junior lieutenant. The court ruled in favor of the government on six separate, but related counts. It determined that Stelmokas:

voluntarily assisted the enemy in persecuting civil populations, particularly on September 16, 1941 and October 28-29, 1941 (Count I); voluntarily assisted German forces in military operations against the United States and its allies (Count II); voluntarily joined and participated in a movement hostile to the United States (Count III); advocated or acquiesced in conduct contrary to civilization and human decency (Count V); lacked good moral character by virtue of his *Schutzmannschaft* membership (Count VI); and willfully misrepresented material facts in his application for admission to the United States as a displaced person (Count IV).[1] I would reverse the district court's determination on each count. Accordingly I dissent.

What we as U.S. Circuit judges know as men and women requires us to despise the loathsome conduct of the Nazis in World War II. Knowledge of the Third Reich's intentional brutalization and annihilation of innocent civilians is ingrained in our senses as a revulsion of the worst genocide of the modern era, if not of all time. Our role as appellate judges, however, is not to proclaim our visceral reactions to the horrors of history. Rather, we must confine ourselves to the trial record in this case and decide, as a dispassionate reviewing court, whether the OSI has proved by "clear, unequivocal, and convincing evidence which does not leave the issue in doubt" that Stelmokas in fact committed the alleged acts and that such conduct supports a denationalization proceeding. *Schneiderman v. United States*, 320 U.S. 118, 158, 63 S.Ct. 1333, 1352-53, 87 L.Ed. 1796 (1943). This the OSI has not done.

---

1. The district court addressed a seventh count (Count VII), in which the government asserted that "defendant's citizenship was procured by willfull misrepresentation or concealment of material facts when applying for naturalization." Dist. Ct. Op. at 8. The district court ruled against the government on this count and the government chose not to raise it on appeal.

Appendix B

The OSI's case against Stelmokas does not rest on direct evidence but solely on a series of rickety inferences that do not rise to the high level of proof demanded of the government. To this unimpressive framework has been added what the district court describes as adverse inferences drawn from Stelmokas' decision to exercise his Fifth Amendment privilege to refrain from testifying at trial. *See* Dist. Ct. Op. at 47. The Supreme Court has established that a defendant's Fifth Amendment plea in a denaturalization case constitutes the basis for adverse inferences only to the extent those inferences are supported by "substantial evidence manifested in the record." *Baxter v. Palmigiano,* 425 U.S. 308, 317-18, 96 S.Ct. 1551, 1557, 47 L.Ed.2d 810 (1976). The OSI's case against Stelmokas lacks such substantial evidence and is hobbled by several fundamental weaknesses, which together are fatal to the OSI's attempt to meet the unusually high burden of proof required.

First, the OSI has been unable to present even one eyewitness to support its charges. Second, the OSI failed to present any direct evidence or any legitimate circumstantial evidence of participation in proscribed activity that would, as required, logically and unerringly support an incriminating inference. Instead, the OSI relied on as many as five layers of inference to conclude that: (1) Stelmokas was responsible for confining Jews in the Kaunas, Lithuania ghetto when two Jews were shot on September 17, 1941; and (2) he participated in the massacre of thousands of Jews in the *Grosse Aktion* at the same location on October 28-29, 1941. Third, the OSI supported its allegations by introducing undated documents, without accompanying testimony as to their relevance and effect on immigration officials at the relevant times. Fourth, and especially fatal to its case, the OSI failed to present testimony from Displaced Persons Commission personnel or consular officials — as it has in all

similar cases — that Stelmokas' non-disclosure of his 3rd Battalion service in fact impacted or would have impacted the immugration officials' decision-making process and rendered him ineligible for a visa. For these reasons, I would reverse the district court's judgment of denaturalization.

I.

Before analyzing the specific legal questions presented here, I must describe conditions in Europe, and particularly in the displaced-persons camps, at the time Stelmokas applied for his visa in July, 1949. I start with V-E Day, May 8, 1945. Notwithstanding the presence of European nation-states, the power to rearrange the map of Europe had passed to the United States and the Soviet Union. Although Hitler's Reich had come to an end, at its peak the Nazi empire had stretched from the French port of Brest to the Caucasus and from the tip of Norway to the border of Egypt. As part of its rampage, the Nazi war machine smashed into Lithuania on June 22, 1941; three days later it occupied Kaunas, what was then the Lithuanian capital.

By the end of the six-year struggle to bring down the Nazi empire, an estimated 40 million Europeans had lost their lives — in combat, under the bombs that obliterated cities, through Hitler's methodical genocide, or simply from hunger, cold and disease. At the end of the war, the state of Germany had ceased to exist. An innumerable mass of civilians' freed prisoners and the first waves of 13 million refugees from Eastern Europe wandered the country. Nearly eight million Germans were homeless. People bartered household necessities for food and clothing, often subsisting on little more than 1,000 calories a day.

Appendix B

The onset of a chill between the Soviets and the Western allies sealed the division of the country between two hostile occupation zones. By 1947 it was becoming clear that Stalin had no intention of fulfilling his promise, made to Roosevelt and Churchill at Yalta, to hold free elections in Poland. Where the Red Army stood, Soviet power reigned, straining westward. A Communist insurgency, supported from bases in Bulgaria, Albania and Yugoslavia, threatened the vulnerable British-backed monarchy in Greece. Soviet pressure mounted against Turkey for control of the Black Sea straits.

Such was the political climate surrounding the displaced-persons camps when Stelmokas applied for his visa in 1949 at Hamburg, Germany. Refugees were caught in a vicious political struggle between the two superpowers. With American and Soviet diplomatic armies posturing eyeball-to-eyeball; the *de facto* division of Germany already had taken place. The die having been cast in both the west and the east by the occupying armies, Central Europe remained the primary political battleground for almost a decade after V-E Day.[2]

It is against this complex and volatile political background that I consider the legal issues arising from Stelmokas' visa application. Indeed, the facts underlying the legal issues must be viewed as they existed in the harsh environment of a battered and shattered post-war Europe, not as they might be viewed from the cozy environment of a 1996 federal courtroom.

---

2. *See* Special Report, Forty Years After V-E Day, Time Magazine, 16-13 April 29, 1985. *See also United States v. Kowalchuk*, 773 F.2d 488, 500 (3d Cir.1985) (Aldisert, Chief Judge, dissenting), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 303 (1986).

Appendix B

I agree with the government that the wartime Lithuanian and German documents generated in Lithuania and obtained by the OSI from archives are admissible. However, I question whether these documents alone are sufficient to support the government's high burden of proof.

II.

I turn first to Count I, the linchpin of the government's entire case against Stelmokas. In Count I the government alleges that Stelmokas voluntarily assisted the Nazis in persecuting civilian populations. The OSI anchors this contention on the events of September 16-17, 1941 and October 28-29, 1941.

A. September 16-17, 1941

I accept that Order # 10 of the 3rd Auxiliary Police Service Battalion, dated September 15, 1941, indicates that "Junior Lieutenant STELMOKAS" was detailed as "Guard Commander in Vilijampole." A1316. From this, and from evidence that two Jews were killed in the Kaunas ghetto between September 16 and 17, 1941, the district court reached the following conclusion:

> The Court finds that the Government has not established by clear, unequivocal, and convincing evidence that the shootings on September 16-17, 1941 were carried out by either the defendant or *Schutzmannschaft* members under his command. However, the Government has established by clear, unequivocal, and convincing evidence that defendant was commander of the ghetto guard for a 24-hour period commencing September 16, 1941, at 1 p.m., that Jews in

the ghetto were subject to extreme deprivation, brutality, and arbitrary shootings during that period, and that defendant was responsible for enforcing the confinement of Jews in such conditions.

F.F. 60

A conclusory inference predicated on a clear and narrowly established fact might have been sufficient to inculpate Stelmokas. However, an inference teased from a series of other inferences may not substitute for hard evidence where the government's burden is so high.[3] And that is the extent of the government's case and that is also why the district court found that "the government has not established by clear, unequivocal, and convincing evidence that the shootings on September 16-17, 1941 were carried out by either the defendant or *Schutzmannschaft* members under his command." F.F. 60. The district court went further, however, and concluded that Stelmokas was commander of the ghetto guard and enforced

3. "An *inference* is a process in which one proposition (a conclusion) is arrived at and affirmed on the basis of one or more other propositions, which were accepted as the starting point of the process. Stebbing observes: 'Inference . . . may be defined as a mental process in which a thinker passes from the apprehension of something given, the datum, to something, the conclusion, related in a certain way to the datum, and accepted only because the datum has been accepted.' (L. Stebbing, A Modern Introduction to Logic 211-212 (6th ed.1948)). It is a process where the thinker passes from one proposition to another connected with the former in some way. But for the passage to be valid, it must be made according to the laws of logic that permit a reasonable movement from one proposition to another. Inference, then is 'any passing from knowledge to new knowledge.' (J. Brennan, A Handbook of Logic 1 (1957)). The passage cannot be mere speculation, intuition, or guessing." Ruggero J. Aldisert, Logic For Lawyers: A Guide to Clear Legal Thinking 29 (1989).

confinement of Jews in horrible conditions. Because the government did not meet its high burden of proving these aspects of its allegations, the district court erred.

1.

Unlike virtually every other case prosecuted by the Office of Special Investigations, here no direct evidence shows that Stelmokas confined Jews to the ghetto during the days question. Indeed, the direct evidence presented in this case is limited to the following: That deployed in the Kaunas, Lithuania area were at least two Lithuanian army units under the control of the Nazis — the 3rd Auxiliary Police Service Battalion (also described hereafter as *Schutzmannschaft*), in which Selmokas was an officer, and a *Sonderkommando* company of approximately 205 Lithuanian partisans, in which Stelmokas was not a member; that Stelmokas was listed as "Guard Commander in Vilijampole" of the 3rd Battalion; that shootings of Jews in the ghetto by Nazis and Lithuanians frequently occurred[4] and that two Jews were killed in the ghetto on September 17.

It is uncontradicted that "Vilijampole" was a neighborhood containing not only the ghetto, but also surrounding areas including Fort VIII, which was situated 100 meters or more from one border of the ghetto. It bears repeating that although Stelmokas is accused of commanding the Vilijampole guard on this day, *there is no direct proof* that he commanded the ghetto guard and was responsible for enforcing the confinement of Jews in the ghetto. We are left to infer that a single written order that Stelmokas was "Guard Commande in Vilijampole" demonstrates that the 3rd Battalion, and not the *Sonderkommando* company,

4. Dist. Ct. Op. at 32.

was the ghetto guard on this day. We are left to speculate whether the 3rd Battalion was not merely assigned to guard adjacent areas, including bridges, warehouses, ammunition depots etc. A518-A519. The evidence leaves unanswered the question of whether the unit patrolled parts of the Vilijampole neighborhood that did not include the ghetto — an area that also encompassed non-Jewish residences, businesses and an ammunition warehouse — the ghetto itself, or both. To repeat, there was no direct evidence supporting the district court's determination and the quality of circumstantial evidence was so inferior that it did not satisfy the government's high burden of proof.

No evidence supported the district court's conclusion other than the fact that Stelmokas was assigned as "Guard Commander of Vilijampole" at the time two Jews were killed in the ghetto. No evidence, beyond his assignment, indicated that he in fact served with, or commanded, the ghetto guard. No evidence demonstrated that Stelmokas engaged in the conduct or duties the district court attributed to ghetto guards generally. F.F. 49-60.

2.

Alternatively, even if there was sufficient evidence to show that Stelmokas served with the ghetto guard, the district court failed to heed the teaching of *Fedorenko v. United States,* 449 U.S. 490, 512 n. 34, 101 S.Ct. 737, 750 n. 34, 66 L.Ed.2d 686 (1981) ("The solution to the problem . . . lies, not in 'interpreting' the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether the particular conduct can be considered assisting the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female

inmates before they were executed cannot be found to have assisted in the persecution of civilians."). The cases that interpret *Fedorenko* in the context of Nazi occupations, for the most part, emphasize the distinction between active and passive collaboration with the Nazis. Of necessity, each case is fact specific and turns on the particular evidence in the case. In *United States v. Koreh*, 59 F.3d 431 (3d Cir.1995), for example, we concluded that the defendant who had served as editor of pro-Nazi newspapers containing many anti-Semitic articles assisted in the persecution of Hungarian Jews through his activities. In *United States v. Sprogis*, 763 F.2d 115 (2d Cir.1985), a case dealing with military or constabulary activity under Nazi direction with facts more onerous than those in the case at bar, the court affirmed the denial of the denaturalization complaint brought by OSI.

The court in *Sprogis* emphasized the difference between active participation in hostile acts against civilians and passive accommodation of the Nazis. The defendant Sprogis admittedly served as a member of the local Latvian police, sometimes used by Nazis "to locate, arrest, guard, transport or execute Jews, and to confiscate their property." *Id.* at 117. Sprogis testified that he voluntarily joined the police force. Sprogis was Assistant Precinct Chief and eventually Police Chief. *Id.* at 118. Sprogis conceded he signed and prepared certain documents admitted into evidence demonstrating that he paid farmers to transport Jews to camps for confinement and persecution, of which he was aware. *Id.* He testified he was "the highest ranking officer" present at a police station where nine Jews were "forcibly detained." He conceded, and later contradicted his concession, that he "ordered other policemen to guard the prisoners." *Id.* at 119. Sprogis was in Litene on the day 200 Jews were executed en masse and contended he was there at the insistence of the

district police chief and "only to witness, on behalf of the police," the execution of a photographer. Sprogis testified that as he was leaving Litene he saw 100 to 150 prisoners marching toward the camp where the photographer had been executed. Testimony by other witnesses indicated that "Sprogis, at the direction of the Nazis, ordered the arrest of all Jews in the area .... that the [police force of which he was a part], including Sprogis, participated in transporting and guarding approximately 200 Jews just prior to their execution. . . ." *Id.* at 120.

As in the case at bar, in *Sprogis* the government sought denaturalization under 8 U.S.C. §§ 1451(a) and 1427, with allegations grounded in § 10 of the Displaced Persons Act ("DPA"). The government claimed Sprogis' citizenship was "illegally procured" because he failed to disclose in his immigration papers that he assisted in persecuting Soviet prisoners of war, Jews and other civilians while a Latvian police officer. The government also asserted that his citizenship was procured through misrepresentations concerning his participation in persecution.

Confronted with such evidence, the court affirmed the district court's conclusion and stated:

> to prevail under any of its theories, the government had to show that Sprogis assisted in the persecution of Jews or other civilians and that the government had not satisfied its substantial burden of proving that assistance by 'clear, unequivocal, and convincing' evidence which does 'not leave the issue in doubt.'

Sprogis, 763 F.2d at 120 (citing *Fedorenko v. United States,* 449 U.S. 490, 505, 101 S.Ct. 737, 746-47, 66 L.Ed.2d 686 (1981), and quoting *Schneiderman v. United States,* 320 U.S. 118, 125, 63 S.Ct. 1333, 1336-37, 87 L.Ed. 1796 (1943)). The court reiterated the disict court's finding of "no credible evidence at Sprogis personally arrested or ordered the arrest of a Jew or walked the streets . . . with the demeanor of a uniformed or armed conqueror . . . he performed the duties of an ordinary police officer." *Sprogis,* 763 F.2d at 120-21. The court stated:

> Finally, he was present at the police station during the detention of the prisoners and he allowed their incarceration to continue. However, these were not acts of oppression. They do not amount to the kind of active assistance in persecution which the DPA condemns.

Id. at 122, (citing *Laipenieks v. I.N.S.,* 750 F.2d 1427, 1432 (9th Cir.1985) (assistance in persecution under 8 U.S.C. § 1251(a)(19), a companion statute to the DPA, requires "proof of personal active assistance or particpation in persecutorial acts")).

The court of appeals further noted that in each of even the less-than-clear cases of asistance in persecution, "the individual condemned as a persecutor had actively particitated in some act of oppression directed against persecuted civilians." *Id.* at 122. The court went on to acknowledge Sprogis' passive accommodation of the Nazis, but stated,

> There is no clear evidence that he made any decision to single out any person for arrest

> and persecution or that he committed any hostile act against any persecuted civilian. Sprogis' passive accommodation of the Nazis, like that of so many other civil servants similarly faced with the Nazis' conquest of their homelands and the horrors of World War II, does not, in our view, exclude him from citizenship under the DPA.

Id.

The district court's conclusion that the government established by clear, unequivocal, and convincing evidence that defendant was commander of the ghetto guard during the relevant period and thereby responsible for enforcing confinement of Jews is based only upon the fact that he was "assigned" as "Guard Commander in Vilijampole." Even if such a conclusion were supported by the evidence, and I do not believe it was, it would be insufficient grounds on which to denaturalize a citizen under the reasoning of *Sprogis.* Accordingly, the evidence regarding Stelmokas' conduct on September 17, 1942 was not sufficient to sustain the district court's conclusion in Count I.

B. October 28, 1941

During the *Grosse Aktion* of October 28-29, 1941, more than 9,000 Jews were massacred in Kaunas, Lithuania. The OSI contends that Stelmokas participated in this slaughter, again on the basis of very limited direct evidence. The only direct evidence is that two witnesses stated in 1994, drawing upon their childhood memories 54 years past when they were 12 and 14 years of age, that they recall seeing men in Lithuanian army uniforms participating in the massacre. The record indicates that these

Appendix B

Lithuanian soldiers could have been members of either the *Sonderkommando* company or the 3rd Battalion. No evidence confirms that these Lithuanian soldiers were members of the 3rd Battalion, of which Stelmokas was a member, or that he participated in any massacre. Yet because a large number of Jews was involved, Dr. Raul Hilberg, the OSI's expert witness, concluded that the Nazis must have needed help to do their killing and that Stelmokas must have participated in the massacre.[5] In so doing, Dr. Hilberg pieces together a rather tenuous inferential chain:

• Facts: Thousands of Jews were salughtered in the ghetto on October 28, 1941; two eye-witnesses testified 54 years later that soldiers wearing Lithuanian uniforms participated. Such soldiers could have been members of the *Sonderkommando* or the *Schutzmannschaft.*

---

5. Indeed, the district court based its finding that the 3rd Auxiliary Police Service Battalion of Lithuanians must have participated in the *Grosse Aktion* solely on the basis of Dr. Hilberg's testimony that the Nazis could not have committed the massacre alone:

> The magnitude of the Grosse Aktion required the participation of an entire battalion of Lithuanian Schutzmannschaft. "A battalion of roughly five hundred, even augmented with some Germans, would have been barely capable of accomplishing the objective, which was the killing of these 9200 people." Tr., Feb. 28, at 137 (testimony of Dr Hilberg). The Germans at times used forces larger than one battalion to perform massacres of les than ten thousand people. Tr. Feb. 28, at 138.

Dist. Ct. Op. at 34.

Appendix B

• First Inference: Because many Jews were killed on that date, the Nazi occupiers must have had insufficient numbers to conduct the operation themselves.

• Second Inference: Being unable to conduct the operation themselves, the Nazis must have ordered Lithuanian uniformed soldiers to assist.

• Third Inference: Because the Nazis had to enlist such help, and because two eye-witnesses testified that they saw men in Lithuanian uniforms, the 3rd Battalion must have been one of the two Lithuanian army units commanded by the Nazis to assist. This is either a non sequitur or an invalid disjunctive syllogism.

• Fourth Inference: Because the Nazis had to enlist the 3rd Battalion, all battalion officers must have participated.

• Fifth Inference: Assuming that the 3rd Battalion was the group ordered by the Nazis to assist (Inference Three), and that officers in that battalion participated (Inference Four), then Stelmokas, as an officer, must have participated.

The ultimate inference urged by the OSI is that Stelmokas participated in the *Grosse Aktion.* For an inference to be legitimate, as set forth in note 3 *ante,* the reasoning upon which it rests must pass from some evidentiary fact (the datum) to a conclusion related in some way to that evidentiary fact and accepted only because that fact has been established. Here, however, the conclusion (Stelmokas participated) is not directly related to the datum (many Jews were killed by soldiers and some soldiers wore Lithuanian army uniforms). Instead, the conclusion requires that one meander through four other

inferences to reach the datum. One cannot make this stretch in the law, piling inference on inference on inference, and still meet the high burden of "clear, unequivocal, and convincing evidence which does not leave the issue in doubt."

That men in Lithuanian uniforms were allegedly present simply cannot support the bold conclusion that these men must have been members of the 3rd Battalion, let alone that one of these men must have been Stelmokas. The men in Lithuanian uniforms very well could have been members of the *Sonderkommando* company. A comparable chain of quintuple inferences such as that relied upon by the government and district court in this case, could not, as a matter of law, support a charge of shoplifting, let alone bolster the revocation of a petitioner's citizenship — a punishment tantamount to exile or banishment. Accordingly, I agree with Judge Stapleton and I accept his analysis in the concurring opinion that the government did not meet its high burden of proof that Appellant participated in the *Grosse Aktion* of October 28-29,1941.[6]

For the reasons presented above, I would reverse the court's determination on Count I.

III.

In Count II the government alleges that Stelmokas was ineligible for a visa because he voluntarily assisted the enemy forces in their operations against the United Nations. The heart

6. For purposes of any subsequent proceedings in this country or elsewhere, it should be recorded that a majority of this court have concluded that the government failed to prove that Stelmokas participated in the heinous *Grosse Aktion* of October 28-29, 1941, and that the district court concluded that he did not participate in the killing of two Jews on September 17, 1941.

of this contention is that a finding of mere service in the 3rd Battalion *(Schutzmannschaft)* and in the 91st Light Flak Replacement Unit of the German Army was sufficient to meet the government's high burden of proof required for denaturalization.[7] I find this argument unpersuasive for two reasons.

First, the government relies on part II of the International Relief Organization (IRO) Constitution, incorporated into the Displaced Persons Act. That provision precludes certain people from being considered for naturalization as follows.

> Persons who will not be the concern of the organization:
>
> 2. Any person who can be shown:
>
> . . . .
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

D.P.A. § 2(b), Pub.L. 80-774, ch. 647, 62 Stat. at 1009 (incorporating IRO Constitution, Annex I, Part II). An explanatory regulation later adopted by the Displaced Persons Commission (DPC) interprets "operations against the United Nations" as follows:

---

7. Stelmokas served with the 3rd Battalion from September 1, 1941 until February, 1942, at which time the battalion was renumbered as the 11th Battalion. He remained with this outfit until May, 1943, when he was transferred to the 253rd Battalion in which he served until August, 1944. He was subsequently transferred to the 91st Light Flak Replacement Unit of the German Air Force. For convenience, the term "3rd Battalion" will be used to describe all of his relevant service.

Appendix B

> [Anyone who] has voluntarily borne arms in armed forces or auxiliary organizations against the United States or its Allies *on the Western Front* (including North Africa and Italy) during that period of World War II beginning December 8, 1941; a person shall not be deemed so to have served voluntarily if he establishes that he was compelled against his will to serve in the armed forces or auxiliary organizations, against the United States or its Allies on the Western Front.

8 C.F.R. § 702.8(f) (my emphasis). The 3rd Battalion served in the occupied Baltic countries, not on the Western Front, and the complained of activities took place before December 7, 1941. Therefore, Stelmokas does not appear to be in that category of persons who assisted the enemy in military operations against the United States or its Allies in the Western Front.

Moreover, commentary to the IRO Constitution provides:

> Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance."

IRO Constitution, Annex I, Part II, 62 Stat. 3037, 3052.

At trial, direct testimony was adduced that normal 3rd Battalion duties included guarding stationary installations such as bridges, warehouses, government buildings, peatbogs,

ammunition depots and communications facilities. A283-284. Official interpretations of Section 2(b) of the IRO Constitution, especially those limiting improper activities to those performed on the Western Front, required the OSI to produce more evidence than mere membership in a military or constabulary unit to support its contention in Count II. *See also* the discussion in Part IV, *post,* exempting from "movement which is or has been hostile to the United States" service in military forces or local constabularies. Under these circumstances I would hold that the government failed to produce sufficient evidence to sustain Count II.

IV.

In Count III the government charges that Stelmokas participated in a movement hostile to the United States. The district court concluded that mere participation in the 3rd Battalion was sufficient to warrant denaturalization and that the government met its burden by demonstrating that Stelmokas volunteered to serve in the 3rd Battalion, a Lithuanian *Schutzmannschaft,* an organization on the U.S. government's Inimical List. On this issue, I find unavailing both the government's argument and the district court's conclusion.

Although the government placed an Inimial List in evidence, A1644, it presented no evidence that mere membership in any organization on the List was sufficient to deny an applicant a visa. Indeed, in addressing "the materiality issue or rejections under the inimical list," OSI trial counsel represented to the district court that it was necessary to present "the testimony of someone who was — who operated or applied it. . . . " A723. The district court made clear that explanatory testimony was mandatory: "It seems to me, with the list and with someone

explaining how the list was utilized at the time of Mr. Stelmokas' application, yes, the answer is, it might [be relevant]." *Id.* This exchange clearly demonstrated the need for official explanation of how the List would have applied to persons seeking displaced-persons status.

Yet no such explanatory testimony was forthcoming. The only evidence introduced was an Inimical List in the nude. Although Appellant's counsel stipulated that it was an Inimical List and in effect at the relevant times, he did not stipulate that the DPG or the Consular Service would deny visas on the basis of mere membership in an organization on the List.[8] More important, the record is totally barren of testimony from any witness that membership in the *Schutzmannschaft,* in and of itself, would have been sufficient to deny displaced-person status in 1949.

Further, the federal regulation which governs § 13 of the Displaced Persons Act limits the disqualification of applicants for displaced-persons status to any person who:

> (d) Is or has been a member of or participated in any *movement* which is or has been hostile to the United States or the form of government of the United States; such a movement includes but is not limited to the communist, Nazi or Fascist parties or

---

8. The statement contained in Appellant's Supplemental Brief that "[t]he government has placed the so-called inimical list in evidence but it is undated and there is no testimony as to when it was published. . . ." runs counter to Appellant's counsel's stipulation at trial that the List was in effect at the time Stelmokas applied for his visa. Appellant's Supp. Br. at 22.

> political or subversive groups of an ideological character similar to that of the aforementioned parties; . . . .

8 C.F.R. § 702.8(d) (my emphasis). By cable dated April 20, 1949, Secretary of State Dean Acheson interpreted "movement" in § 13 of the Act not to include military forces or local constabularies. Appellant's Br., Exhibit A. Significantly, at the time Stelmokas made his application in July, 1949, the Secretary of State's directive was in full force and effect. Given that the 3rd Battalion operated very much as the local constabulary,[9] Stelmokas' membership in that organization should not for purposes of § 13 be construed as membership in a "movement" hostile to the United States and its allies.

The government failed to produce testimony describing how the List was used. There is not a smidgeon of evidence to indicate that mere membership in an organization named on the Inimical List was a sufficient basis on which to deny Stelmokas' visa application. Moreover, Secretary Acheson's interpretation of "movement" indicates that Stelmokas' membership in the 3rd Battalion, a military force or constabulary, was not sufficient to trigger disqualification for displaced-persons status under the Displaced Persons Act. Accordingly, the government has failed to meet its high burden of proving that Stelmokas, by mere membership in a local military or constabulary organization, voluntarily participated in a movement hostile to the United States. I would therefore reverse the court's conclusion on Count III.

---

9. Webster's New Riverside Dictionary defines "constabulary" as "[a]n armed police force organized like a military unit." The *Schutzmannschaft* operated as a local auxiliary police battalion, a regional protective force under the supervision of the occupying Nazis. *See* Dist. Ct. Op. at 23.

Appendix B

V.

At the time of Stelmokas' immigration in July, 1949, U.S. State Department regulations prohibited issuing visas to any alien "who has advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries." 22 C.F.R. § 53.33(j). In Count V the government alleges that under this regulation Stelmokas was ineligible for a visa. The government contends that he was ineligible first, because he failed to leave the 3rd Battalion and second, because he persecuted civilians on September 16-17 and October 28-29, 1941. I will address these arguments in turn.

The district court determined that Stelmokas' "failure to leave the *Schutzmannschaft* or act on behalf of the Jews constituted acquiescence in conduct contrary to civilization." The court thus concluded that the government had met its burden on Count V. Dist. Ct. Op. at 55-56. The court erred than mere membership in the *Schutzmannschaft* is necessary to prove conduct contrary to civilization and human decency. Indeed, the Supreme Court teaches that mere membership is not enough and that there must be proof of actual participation in such conduct. The Court has indicated that appropriate statutory interpretation in this context requires "focusing on whether particular conduct can be considered assisting in the *persecution* of civilians." *Fedorenko v. United States,* 449 U.S. 490, 512-513 n. 34, 101 S.Ct 737, 750-751 n. 34, 66 L.Ed.2d 686 (1981). Although it is undisputed that Stelmokas was a member of the 3rd Battalion, the record provides no evidence that he participated in conduct that amounted to persecution of civilians. It is *conduct* in an organization, not mere membership, that determines culpability.

The government contends in Count V that Stelmokas

acquiesced in conduct contrary to human decency by participating in the persecution of Jews on September 16-17 and October 28-29, 1941. As I have indicated in my discussion in Part II, the government did not meet its high burden of proving that Stelmokas actually participated in persecuting Jews on these dates. Professor Hilberg's testimony is significant in this respect: "I did not see in any of the sequence of documents . . . anything that would indicate [sic (implicate?)] Stelmokas directly in the arrest, killing of Jews, but he is in the company in which these things are going on." A626. Passive accommodation of the Nazis, as distinguished from personal, active assistance in persecution, does not constitute conduct contrary to civilization and human decency. *Fedorenko,* 449 U.S. at 512-513 n. 34, 101 S.Ct. 750-751 n. 34. *See also United States v. Sprogis,* 763 F.2d 115, 122-123 (2d Cir.1985); *Ofosu v. McElroy,* 933 F.Supp. 237, 243-244 (S.D.N.Y.1995.)

The government has not demonstrated that Stelmokas' mere membership in the 3rd Battalion constituted advocacy of, or acquiescence in, conduct contrary to civilization. Moreover, the record is devoid of any competent or persuasive evidence that Stelmokas played a role in the persecution of Jews in September and October, 1941. Thus, on Count V the government has failed to meet the high burden of proof required for denaturalization. Accordingly, I would reverse the district court's determination on this issue.

VI.

In Count VI the government charges Stelmokas with illegally procuring his citizenship because his membership in the 3rd Battalion and his participation in the persecutors of September and October, 1941 showed a lack of good character. The district

court found in favor of the government on the basis of Stelmokas' voluntary enlistment in the *Schutmannschaft* and direct assistance and participation in the persecution of Jews in Lithuania. The court concluded that these factors establish a lack of good moral character. Dist. Ct. Op. at 56-57.

As I previously set forth in Part II, the government failed to prove that Stelmokas was voluntarily and directly involved in the persecution of Jews in September and October 1941. Moreover, this court recently affirmed a district court's conclusion that determination of a person's moral character must rely on something more than superficial evidence of a person's status or title:

> [T]he very essence of meaningfully determining a person's moral character is not simply to look at their status or title . . . but to examine the actor's conduct and the circumstances surrounding it. We refuse to revoke citizenship by finding that a person *prima facie* lacks good moral character simply because he held the title of concentrator camp guard without some further showing that the person engaged in some morally reprehensible conduct and did so voluntarily.

United States v. Schiffer, 831 F.Supp. 1166, 1199 (E.D.Pa.1993), *aff'd* 31 F.3d 1175 (3d Cir.1994.) Absent evidence of any illegal conduct and based on nothing more than Stelmokas' mere membership in the 3rd Battalion, the government could not prove and the district court improperly concluded that he lacked the good moral character required for citizenship. Accordingly, the court erred in granting judgment to the government on Count V.

Appendix B

VII.

In Count IV the government alleges that Stelmokas' order and certificate of naturalization should be revoked

> on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation.

8 U.S.C. § 1451(a). In its complaint the government contended "that in failing to list his wartime residences and occupation, Stelmokas made a willful and material misrepresentation when applying for Displaced Person status as defined in § 10 of the Displaced Persons Act" Compl. ¶¶ 57-58, 62. The contention was an attempt to prevail on the "procured by" clause of § 1451(a), but the district court found against the government on that claim. *See* note 1, *ante*. The court found in favor of the government's claim brought under the "illegally procured" clause, concluding that:

> Defendant's misrepresentations and concealments to the DPC and the U.S. vice-consul were material because they concealed the fact that defendant had assisted the enemy in the persecution of civilians, had voluntarily assisted the military operations of the Axis powers, and had been a member of a movement hostile to the United States and its form of government.

Cone. Law 32.

From this the court concluded: that Stelmokas was ineligible to immigrate pursuant § 10 of the DPA; that such ineligibility rendered his entry unlawfill; and because his entry was unlawful, "his naturalization as a United States citizen on April 11, 1955 was illegally procured." Conc. Law 33.

The government's reliance on the "illegally procured" clause must not be evaluated in a vacuum. The district court's ultimate determination is the conclusioin of a polysyllogism with many premises omitted. The polysyllogism begins with a major premise stating that § 10 of the DPA barred from immigration any person who willfully misrepresented material facts in order to gain entry as a displaced person. The argument next contends that Stelmokas made misrepresentations and because the misrepresentations were material, he was ineligible for entry; therefore, Stelmokas' actual entry was unlawful and his naturalization "illegally procured." The critical inquiry is whether the government met its important threshold burden of proving a misrepresentation as defined in the Displaced Persons Act.

A.

Our starting point is the statute:

> Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States.

D.P.A. § 10, Pub.L. No. 80-774, ch. 647, 62 Stat. 1009 (1948). When Stelmokas applied for citizenship in 1949, eligibility investigations and reports were made only by the Displaced

Persons Commission (DPC). The Commission defined misrepresentation for the purpose of § 10 of the Act:

> Misrepresentation. "Misrepresentation for the purpose of gaining admission into the United States" refers to a willful misrepresentation, oral or written, to any person while he is charged with the enforcement or administration of any part of the Displaced Persons Act, of any matter material to an alien's eligibility for any of the benefits of the said Act.

8 C.F.R. § 700.11. It is not disputed that Stelmokas misrepresented his wartime residences and occupation. Thus, the first inquiry is whether those misrepresentations met the legal standard of materiality.

The Supreme Court established the current test in *Kungys v. United States:*

> [A] concealment or misrepresentation is material if it 'has a natural tendency to influence or was capable of influencing, the decision of' the decision making body to which it was addressed . . . We hold, therefore, that the test of whether Kungys' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service.

485 U.S. 759, 770-772, 108 S.Ct. 1537, 1546-1547, 99 L.Ed.2d

839 (1988) (citing, *inter alia, Weinstock v. United States,* 231 F.2d 701-02 (D.C.Cir.1956)). I concede that Stelmokas' failure to disclose his wartime military status would have had a natural tendency to influence immigration decisions. However, as the Court made clear in *Kungys* and *United States v. Gaudin,* __ U.S. __, __, 115 S.Ct. 2310, 2319, 132 L.Ed.2d 444 (1995), materiality is a mixed question of law and fact. As in all mixed questions, the definition of the legal component must come first, followed by a presentation of facts against which the legal component must be measured.

In denaturalization cases, equally important to establishing a material statement is the presentation of evidence that the misrepresentation procured the order and certificate of naturalization. *See Gaudin,* __ U.S. at __, 115 S.Ct. at 2314. This is the factual component of the mixed question. Establishing at least a modicum of evidence on the procurement element is essential to the government's burden of proof.

In *Kungys,* a prototype of OSI prosecution, the defendant twice misrepresented his date and place of birth: once in 1947, when applying for a visa, and again in 1954, when petitioning for naturalization. The Court approved dismissal of the government's complaint against Kungys because misrepresentations about his place of birth, wartime occupations and residence were not shown to be unequivocally material. In addition to being required to demonstrate materiality as a matter of law, i.e., that a material statement was made, the government was obligated to demonstrate that Kungys' citizenship status was procured by his material misrepresentations. The Government seems to ask this court to apply different meanings to the term "procured" in the two clauses of § 1451(a).

Appendix B

The government suggests that it has different ultimate burdens depending on whether "procured" applies to naturalizations that are "illegally procured" or to those "procured by concealment of a material fact or by willful misrepresentation." There is no rational support for the suggestion that Congress intended such an anomalistic reading of the same word in the same section of the same statute. There is absolutely no rational support for the notion that the government is not required to produce evidence showing precisely how Stelmokas was "*unlawfully* admitted" and whether his naturalization was in fact "illegally *procured.*" If under the second clause in § 1451 the government must show that the naturalization was "procured by" the alleged misrepresentation, as the Court held in *Kungys,* then under the first clause certainly the government must demonstrate that Stelmokas was ineligible and therefore unlawfully admitted.

The traditional procedure by which the government has shown ineligibility, used in every case it has brought excepting this one, is to proffer testimony that the applicant's naturalization, or Displaced Persons status, resulted from the alleged misrepresentations. Even if we do not require the government to prove the visa or naturalization certificate would not have been granted but for the misrepresentations, until today courts have not permitted the government to proceed without any evidence whatsoever on the question of whether the misrepresentations procured the applicant's citizenship.

Indeed, the combined opinions of Justices Scalia and Brennan in *Kungys,* and Justice Scalia's opinion for a unanimous court in *Gaudin,* indicate that the government must establish by factual evidence how immigration officials interpreted and administered the immigration law during the period in question.

The government must show not only that the misrepresentation would have a "natural tendency to influence" the DPC analyst's decision, but also that the misrepresentation did in fact influence that decision. Thus, Justice Scalia's opinion for the *Kungys* Court points out that § 1451(a) of the denaturalization statute contains four independent requirements:

> the naturalized citizen must have [1] misrepresented or concealed some fact, [2] the misrepresentation or concealment must have been willful, [3] the fact must have been material, and *[4] the naturalized citizen must have procured citizenship as a result of misrepresentation and concealment*

485 U.S. at 767, 108 S.Ct. at 1544 (my emphasis).

The requirements above must similarly be established in this case to prove the § 10 Displaced Persons Act allegations made by the government. The repeated use of the word "procured" in both grounds for revoking naturalization under § 1451 makes clear Congress' intent to impose on the government the fourth requirement — that some nexus be established between the misrepresentation or unlawful conduct and the applicant's receipt of the naturalization certificate —regardless of the clause under which the government files suit.

I have acknowledged that the first three of the *Kungys* requirements were met here. In view of the Court's definition of materiality, Stelmokas' misrepresentations were material to the extent that they had "a natural tendency to influence the decisions." *Id.* at 768, 108 S.Ct. at 1545. The critical lack of proof in this case lies with the fourth requirement — that the

misrepresentations did, in fact, result in ineligibility. Without this critical factual base, the argument may not properly proceed to subsequent prosyllogisms and episyllogisms culminating in "unlawfully admitted" and "illegally procured."

The fourth requirement was not controverted in *Kungys* because the government produced the testimony of Ambassador Seymour Maxwell Finger, a former vice-consul at Stuttgart, Germany, who described how immigration officials had interpreted and administered the immigration law during the period in question. *See United States v. Kungys,* 793 F.2d 516, 530-31 (3d Cir.1986). Justice Brennan, who furnished the fifth vote for the majority in *Kungys,* emphasized in his concurring opinion that such testimony was essential. 485 U.S. at 783, 108 S.Ct. at 1552-53. Thus, the precise holding in *Kungys* was that only after presentation of a *prima facie* factual case and a demonstration of materiality was the government entitled to a presumption that the applicant was ineligible for citizenship. Justice Brennan's concurrence eloquently articulates his concern that the "precious right" of citizenship not be revoked unless the government has met its full evidentiary burden:

> I agree with this construction of the statute. I wish to emphasize, however, that in my view a presumption of ineligibility does not arise unless the Government produces evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed. It is this fair inference of ineligibility, coupled with the fact that the citizen's misrepresentation necessarily frustrated the Government's investigative efforts, that in my mind justifies the burden-shifting

> presumption the Court employs. Evidence that simply raises the possibility that a disqualifying fact might have existed does not entitle the Government to the benefit of a presumption that the citizen was ineligible, for as we have repeatedly emphasized, citizenship is a most precious right, . . . and as such should never be forfeited on the basis of mere speculation or suspicion.

Id. at 783, 108 S.Ct. at 1553 (citation omitted).

Fatal to the OSI's argument in the case before us is the government's failure, in Justice Brennan's words, to "produce evidence sufficient to raise a fair inference of ineligibility." *Id.* The absence of factual evidentiary support regarding ineligibility based on Stelmokas' statements renders wholly speculative the conclusion that such misrepresentations led to an unlawful admission to the United States and ultimately illegally procured his naturalization.

I find no inconsistency between the teachings in the opinions of the Court in *Kungys* and *Gaudin,* both authored by Justice Scalia. In *Kungys,* a denaturalization case involving the second "procured by" clause of § 1451, the Court required presentation of factual evidence that "the naturalized citizen must have procured citizenship as a result of misrepresentation or concealment." 485 U.S. at 767, 108 S.Ct. at 1544-45. It follows inexorably that when relying on the "illegally procured" clause, the government must also present evidence demonstrating that the admittee was ineligible for admission. In *Gaudin* the Court stressed the necessity of developing the *factual* basis of "materiality" and emphasized that materiality is "a mixed

question of law and fact [in which a characterization] for one purpose does not govern its characterization for all purposes." __ U.S. at __, 115 S.Ct. at 2319. Similarly, the Court in *Kungys* stressed the importance of presenting facts on the issue of illegal procurement of citizenship by referring to the testimony of Ambassador Finger on how immigration officials interpreted and administered immigration law during that period. Making reference to this in *Gaudin*, Justice Scalia described *Kungys* as an example where "the appellate court's newly asserted standard of materiality could be applied to the *facts* [of materiality] by the appellate court itself, instead of requiring remand to the District Court for that application." *Id.* at 772, 108 S.Ct. at 1547; __ U.S. at __, 115 S.Ct. at 2314.

In every successful OSI prosecution that I have researched, the government raised this fair inference by presenting evidence in two discrete respects: (1) endence detailing wartime activities of the defendant; and (2) testimony from appropriate U.S. officials that had these activities been known to the Displaced Persons Commission analysts, the defendant's application would have been denied or subjected to additional investigation. Indeed, every OSI prosecution that I researched contained testimony by officers of the Displaced Persons Commission, consular officers or both describing the effect that a particular misrepresentation would have had on the analysts examining the application. This essential testimony sets forth whether the authorities would have granted, denied, or referred the application for further investigation,[10] and it sets forth a *prima facie* case on whether the

---

10. *See Fedorenko v. United States*, 449 U.S. 490, 499, 101 S.Ct. 737, 743-44, 66 L.Ed.2d 686 (1981) (vice consul in Germany who reviewed DPA visa applications testified that petitioner's service as an armed guard made him ineligible for a visa); *United States v. Kungys*, 793 F.2d 516, 530-531 (3d Cir.1986) (vice consul testified there would have been an investigation (Cont'd)

applicant's alleged misrepresentations procured the visa and naturalization decisions made by the officers.

(Cont'd)

if truth were known), *rev'd* 485 U.S. 759, 108 S.Ct. 1537, 99 LEd.2d 839 (holding that misrepresentations were not material, despite testimony); *United States v: Koreh*, 856 F.Supp 891, 901 n. 7 (D.N.J. 1994), *aff'd* 59 F.3d 431, 443-444 (3d Cir.1995) (employees who set policy for implementation of IRO Constitution testified defendant's conduct would have rendered him ineligible); *United States v. Kowalchuk*, 773 F.2d 488, 494 (3rd Cir 1985) (DPC employee from 1948 to 1952 testified that applicant who served in the Ukrainian Schutzmannschaft would have been rejected), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 303 (1986); *Kalejs v. Ins*, 10 F.3d 441, 446-447 (7th Cir.1993) (misrepresentation material because two former consular officials testified that if petitioner had told the truth it would have prompted further inquiry), *cert denied.* 510 U.S. 1196, 114 S.Ct. 1305, 127 L.Ed.2d 656 (1994); *Maikovskis v. INS*, 773 F.2d 435, 438 (2d Cir.1985) (official who issued petitioner his visa testified that if she had known of his police activities she would have concluded that the petitioner was *per se* ineligible); *United States v. Sprogis*, 763 F.2d 115, 120 (2d Cir.1985) (six former immigration officials testified that petitioner's activities would have required denial of entry); *United States v. Schiffer*, 831 F.Supp, 1166, 1198 (PD.Pa.1993) (General Counsel and Assistant District Director for Citizenship for INS in Pennsylvania from, 1955-65 testified that if applicant had revealed wartime service, he would have been denied naturalization), *aff'd*, 31 F.3d 1175 (3d Cir.1994) *United* States *v. Koziy*, 540 F.Supp. 25, 32 n. 14, 33 n. 15 (S.D. Florida 1982)(employee with preparatory commission of the IRO testified that people with defendant's affiliation would not have been eligible for IRO assistance; and case analyst for DPC testified membership in an organization on the inimical list would make the applicant ineligible under the DPA), *aff'd*, 728 F.2d 1314 (11th Cir.1984): *United States v. Demjanjuk*, 518 F.Supp. 1362, 1381 n. 42 (N.D.Ohio 1981) (vice consul who processed defendant's visa application testified that had he known the truth he would have denied the application), add, 680 F.2d 32 (6th Cir.1982): *United States v. Linnas*, 527 F.Supp. 426, 439 n. 34 (E.D.N.Y.1981) (government witnesses indicated that a guard at a concentration camp would be ineligible under the DPA); *United States v. Osidach*, 513 F.Supp. 51, 106 (E.D.Pa.1981) (testimony from INS official that petitioner may have been denied was insufficient evidence of materiality).

Appendix B

In the leading Supreme Court cases that inform our denaturalization jurisprudence, the OSI presented witnesses who testified that the visa would not have been issued had the true facts been known. In *Fedorenko,* vice consul Kempton Jenkins testified that the petitioner's service as an armed guard made him ineligible for a visa. *Fedorenko,* 449 U.S. at 498-99, 101 S.Ct. at 743-44. As discussed above, in *Kungys,* Ambassador Finger described how immigration officials interpreted and administered the immigration law during the relevant period. *Kungys,* 793 F.2d at 530-531. Clearly the Supreme Court has underscored the necessity for "testimony about how the Act was interpreted by the officials who administered it." *Fedorenko,* 449 U.S. at 511,101 S.Ct. at 750.

In short, in every prosecution brought by the OSI that I researched, including the Supreme Court decisions central to our jurisprudence in denaturalization matters, the OSI presented evidence not only that the alleged misrepresentations had a natural tendency to influence, but also that they did in fact so influence the visa decision — i.e., that the visa was procured by the applicant's misrepresentations. Such evidence was starkly absent in the present matter and this absence is fatal to the OSI's argument that Stelmokas' naturalization was "unlawfully procured."

My personal research may be faulted. Therefore, at oral argument I asked counsel for the OSI to examine the records of his office to determine whether any other OSI prosecutions have been presented without testimony by a representative of the Displaced Person Commission, the International Relief Organization or the consular service as to the effect of the misrepresentation on the applicant's procurement of citizenship. Counsel responded, "I will send you a letter one way or another,

Judge Aldisert."[11] Although the government's counsel filed a supplemental brief following oral argument, the brief did not supply the information requested by the court. Thus, I will draw the appropriate inferences.[12]

---

11. The following is a more complete version of that exchange:

> THE COURT: And the other cases your office has prosecuted. This is the only case, am I wrong? . . . This is the only case . . . in recent years, that you haven't had evidence from the IRO or a consul?
>
> Counsel: I don't believe that that is the case, Judge Aldisert. I believe that in —
>
> THE COURT: Will you help me out and give me a letter or something on it showing other cases that you have prosecuted where you . . . did not have a representative of the IRO or the consular service testify? I would appreciate that very much
>
> * * * * * *
>
> THE COURT: [A]s I say, you're going to give me that information where you had a successfull denaturalization proceeding without proof of the point that we are discussing.
>
> Counsel: I will send you a letter one way or the other, Judge Aldisert.

12. This would not have been a herculean task. The court did not request an examination of all denaturalization cases processed by the Department of Justice or by U.S. Attorneys, but only those prosecuted by the Office of Special Investigations. Created in 1979, the OSI has been successful "in the

(Cont'd)

Appendix B

B.

I have conceded that Stelmokas' misrepresentation of wartime activities would have had the "natural tendency to influence the decision" of DPC officials. Therefore, the government met its burden of setting forth the legal component of the mixed materiality question. However, the government has not met its high burden of proof in this case because it failed to produce evidence that Stelmokas' misrepresentations procured the decision of the DPC analyst and the natunalization officials. The government failed to produce any prima facie evidence that the visa and naturalization decisions were procured by the alleged unlawful conduct.

Although no such evidence was presented to the district court, the court nonetheless concluded:

> 33. Defendant was ineligible to immigrate to the United States pursuant to DPA § 10. His entry to the United States for permanent residence in 1949 was therefore unlawful and his naturalization as a United States citizen on April 11, 1995 was illegally procured.

Dist. Ct. Op. at 54-55. Here the court conflated a question of law with a question of fact. It decided, and properly so, that the misrepresentation had a natural tendency to influence the decision making. This was the question of law. It then decided,

---

(Cont'd)
denaturalization of more than 50 Nazis and the extradition of three." Legal Times, July 15, 1996. The OSI is comprised of 28 staffers, and given its history of trying denaturalization cases, surely one of these staffers could have assembled the requested data.

as a matter of fact, that the misrepresentation did in fact influence and procure the government's visa decision and, therefore, subsequently procured unlawful naturalization. The court erred here because the record was barren of any testimony regarding what factors procured his visa, let alone which types of misrepresentations would have made Stelmokas ineligible for entry at the time he applied. That the procurement element in § 1451 is a question of fact is set forth in *Kungys* in both the opinion of the Court and the concurring opinion of Justice Brennan; it is also established in *Gaudin* and reflected in OSI's universal practice of presenting testimony by officials as to the immigration policy of the United States at the relevant time.

By way of analogy, a trial judge in a murder case would hear the prosecution's evidence that, as a matter of law, a bullet fired from a defendant's Colt .45 had the natural tendency to cause death. However, the prosecution still would have to prove that, as a matter of fact, a .45 bullet was a factor in the decedent's death. Likewise, as an experienced judge reviewing matters having to do with State Department or immigration policy, I can decide as a matter of law the legal component of a mixed question of law and fact. But it is absolutely necessary that, before I may properly perform that judicial function, some facts be developed against which the legal standard can be measured.

A *fortiori,* I confess ignorance as to the factual overlay of discretionary powers vested in immigration officials in the turbulent post-war years of the late 1940s.[13] I suggest that my distinguished judicial colleagues on this court, on the district

---

13. I must further confess that I do not know how many, if any, former Nazi soldiers or officials, or former German government employees who served during the 1939-1945 conflict, now legally enjoy the privileges of American citizenship.

court and on the Supreme Court also lack this information. Such crucial factual information is not the stuff of which judicial notice is made; it is the stuff that must be presented as record evidence at a trial. Yet the district court determined as a matter of law, without even a prima facie showing regarding relevant United States immigration policy, that "Defendant was ineligible to immigrate to the United States pursuant to the DPA § 10." Dist. Ct. Op. at 54.

The OSI failed to present any evidence on this count. Therefore, the district court was left to speculate about whether the DPA analyst in 1949 would have referred to the Inimical List, how the analyst would have interpreted it, and whether the analyst would have decided to grant, deny, or further investigate Stelmokas' visa application based on that List. Because the OSI failed to present any evidence, the court could only conjecture that the analyst would have thought conditions in occupied Lithuania justified a finding of ineligibility. Because the OSI failed to present any evidence, the court had to surmise that the analyst would have found the 3rd, 11th or 253rd Battalion of the Lithuanian National Labor Defense Battalions actively assisted the Nazis in the persecution of civilian populations.

In short, the government failed to present any testimony by witnesses to prove an actual, a probable, or even a possible impact on the analyst's eligibility decision in July, 1949. Therefore, we are left to hypothesize. Hypothesizing is no substitute for proof, especially where the burden is "substantially identical with that required in criminal cases — proof beyond a reasonable doubt." *Klapprott v. United States,* 335 U.S. 601, 612, 69 S.Ct. 384, 389, 93 L.Ed. 1099 (1949). Therefore, the judgment of unlawful procurement on Count IV must be reversed.

Appendix B

VIII.

This too must be said. In American jurisprudence there is no analogue to permitting a trial on events that occurred a half-century in the past. Indeed, with the exception of murder cases, all criminal and civil proceedings are rigorously circumscribed by fixed statutes of limitations. Such statutes preclude the institution of criminal or civil complaints after a finite number of years. Similarly, in equity petitions, stale actions are barred by the doctrine of laches.[14]

The policy that undergirds our statutory and judicial limitations on such actions is rooted in an understanding that with the passage of time, witnesses disappear and memories fade. Such a policy reflects appreciation for the reality that, because our memories are fragile and inevitably compromised by the ravages of time, at some point they can no longer be considered trustworthy for presentation under oath as "the truth, the whole truth and nothing but the truth." It may well be that a half century after a Displaced Persons Commission's analyst examined the visa application of Jonas' Stelmokas, witnesses are either no longer available or incapable of testifying as to the immigration practices of the United States in 1949. This is the price that the government must pay for bringing any case so long after these events took placed.[15]

---

14. *See Costello v. United States*, 365 U.S. 265, 282, 81 S.Ct. 534, 543, 5 L.Ed.2d 551 (1961) ("None of the cases in this Court considered the question of the application of laches in a denaturalization proceeding.... Laches' requires (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." (citations omitted)).

15. It bears emphasis that the only live witnesses to describe in this proceeding the events that took place in 1941 were testifying about incidents they saw when they were 12 and 14 years of age, respectively. *See* Dist. Ct. Op. at 35.

Appendix B

Given contemporary concepts of due process, it is doubtful that one could be tried in 1996 for a murder that took place in 1941. Nevertheless, the judiciary continues to permit the prosecution of stale denaturalization cases like this one. Perhaps this is because such cases embody a fundamental tension between two venerated precepts of the American legal tradition. One precept dictates that those responsible for the Holocaust be punished that they be sought out in America and either extradited to Israel or denaturalized, deported and ultimately punished by the sovereignty where the despicable acts took place. The other precept demands full compliance with the letter and spirit of the American judicial process; it demands that a prosecution be held to every aspect of its burden of proof, particularly in so important a matter as a denaturalization proceeding. Because such cherished values are at stake, decision by judicial fiat must never replace decision-making based on the presentation of evidence. Thus, when we come to the intersection of such esteemed precepts, we must be especially vigilant to protect the procedures that lie at the heart of our judicial process, lest in our zeal to avenge the victims of the Holocaust, we unwittingly permit our judicial traditions to be victimized.

Those of us who sacrificed years of our youth in World War II to combat the forces of tyranny are understandably sensitive to these issues. We are sensitive to the danger that fundamental values of our glorious American tradition, including the protections guaranteed by our legal system which we fought to preserve, might be compromised in a fervor to punish one who may have aided the bestiality of our common enemy. We are especially sensitive when that effort to punish is initiated more than half a century after the last shot in anger was fired. Certainly those who violate the rules of society must be punished, but society itself must never breach its own rules to achieve that end.

Appendix B

To continue the prosecution of octogenarians (and soon nonagenarians) is, to be sure, a political decision. Such decisions are properly left to the exclusive discretion of our executive branch. Nevertheless, if these prosecutions have not already pushed the envelope beyond traditional notions of due process, soon they will do just that. There is no precedent in our tradition that permits a prosecution on events that occurred so far in the past. Although I have grave doubts about the constitutionality of so stale a prosecution, I do not meet the due process issue here because I would grant relief on other grounds.

For all the foregoing reasons, I dissent. I would reverse the judgment of the district court ordering denaturalization.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 12, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1894

UNITED STATES OF AMERICA

v.

JONAS STELMOKAS, a/k/a JONAS STELMOKEVICIUS,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 92-03440)

Present: Stapleton, Greenberg, and Aldisert, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 10, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 2, 1995, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

Appendix C

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: November 12, 1996

Costs taxed in favor of The United States of America as follows:

Total for Brief	$102.00
Total for Supplemental Brief	$31.00
Total	$133.00

Certified as a true copy and issued in lieu
of a formal mandate on January 29, 1997

Teste: s/ P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED AUGUST 2, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-3440

UNITED STATES OF AMERICA

v.

JONAS STELMOKAS

MEMORANDUM

DUBOIS, J. **AUGUST 2, 1995**

* * *

This is a denaturalization action in which the Government alleges that defendant Jonas Stelmokas ("Stelmokas") served as an officer in German-controlled Lithuanian police battalions and the German Air Force ("Luftwaffe") during World War II and later misrepresented or concealed his wartime activities when applying for immigration to the United States and for naturalization as an American citizen. The Government seeks judgment pursuant to section 340(a) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1451(a), revoking defendant's citizenship and canceling his Certificate of Naturalization.

Appendix D

A nonjury trial was held from February 27 to March 3, 1995 and post-trial briefing was completed on June 20, 1995. This Memorandum sets forth the Court's findings of fact and conclusions of law.

I. INTRODUCTION

A. Background

In the summer of 1949, Jonas Stelmokas applied to the United States Displaced Persons Commission ("DPC") in Germany for a determination of his eligibility to emigrate to the United States as a displaced person. In doing so, Stelmokas became one of thousands of Europeans who, driven from their homelands in World War II, sought to come to the United States under the Displaced Persons Act of 1948 ("DPA"), Pub. L. 80-774, ch. 647, 62 Stat. 1009. *See Fedorenko v. United States*, 449 U.S. 503, 495-96 (1981) (describing history and application procedures of DPA).

As part of the DPA application process, an analyst from the Displaced Persons Commission ("DPC") in Wentorf, Germany, interviewed Stelmokas and filed a report on July 8, 1949 regarding his eligibility for immigration. The report stated that Stelmokas had served as an officer in the Lithuanian Army from August 1939 until his discharge in 1940, then worked as a teacher in Seda, Lithuania until August 1943, and then was unemployed until July 1944 when he fled to Germany in the face of the oncoming Soviet Red Army. According to the report, Stelmokas thereafter worked as a laborer in Dresden until March 1945 and then entered a Displaced Persons Camp in Rotenburg, Germany in May of that year. The DPC report concluded that Stelmokas was eligible to enter the United States as a displaced person.

Stelmokas was subsequently interviewed by a United States vice-consul in Hamburg, Germany. He affirmed under oath that he had resided from 1940 to 1943 in Seda, from 1943 to 1944 in Kaunas, from 1944 to 1945 in Dresden, and then in 1945 in Rotenburg. Like the DPC analyst, the vice-consul concluded that Stelmokas was eligible to immigrate to the United States as a displaced person.

Stelmokas was granted a visa, and on August 31, 1949, he entered the United States and settled in the Philadelphia area. Five years later, he applied to the Immigration and Naturalization Service ("INS") for naturalization as a United States citizen. The application was approved, and, on April 11, 1955, the United States District Court for the Eastern District of Pennsylvania granted Stelmokas' Petition for Naturalization and issued to him Certificate of Naturalization No. 7490987.

Almost forty years later, the Government brought this action to set aside the Order of April 11, 1955, to cancel Certificate of Naturalization No. 7490987, and to enjoin defendant from claiming any rights, privileges, benefits, or advantages under any document evidencing United States citizenship.

B. Denaturalization

The law governing denaturalization actions has evolved around two fundamental principles that serve to ensure the integrity of United States citizenship. *See, e.g., Fedorenko v. United States*, 449 U.S. 503, 505-07 (1981).

On the one hand, United States citizenship is a precious right which, once conferred, may not be lightly revoked. *See Fedorenko v. United States*, 449 U.S. 503, 505 (1981);

Schneiderman v. United States, 320 U.S. 118, 125 (1943) ("[I]t is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than in this country.") To safeguard the interests at stake in a denaturalization action, the law requires the Government to prove its case by evidence that is clear, unequivocal, and convincing so as not to leave the issue in doubt. *Kungys v. United States*, 485 U.S. 759, 772 (1988); *Fedorenko*, 449 U.S. at 505.

At the same time, "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it .... and demand its cancellation unless issued in accordance with such requirements." *United States v. Ginsberg*, 243 U.S. 472, 475 (1917); *Fedorenko*, 449 U.S. at 506 (quoting *Ginsberg*).

Section 340(a) of the INA provides the statutory basis for the revocation of United States citizenship obtained by naturalization. That section imposes on United States Attorneys the duty to seek the revocation of United States citizenship that is "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a). 8 U.S.C. § 1451(a).

Citizenship is "illegally procured" when obtained without compliance with the statutory prerequisites for naturalization. *Fedorenko*, 449 U.S. at 514. At the time of defendant's naturalization in 1955, INA § 316(a)(1) required a petitioner for citizenship to be lawfully admitted to the United States for permanent residence.[1] Lawful admission for permanent residence

1. INA § 316(a)(1) provided in relevant part:

(Cont'd)

in turn required that the individual possess a valid immigration visa.

The DPA provided that immigration visas could be issued to eligible European "displaced persons" without regard to the traditional immigration quotas. Specifically excluded from the DPA definition of "displaced persons" were:

> 1. War criminals, quislings, and traitors.
>
> 2. Any other persons who can be shown:
>
> (a) to have *assisted the enemy in persecuting civil populations* of countries, Members of the United Nations; or,
>
> (b) to have *voluntarily assisted the enemy forces* since the outbreak of the second world war in their operations against the United Nations.

DPA § 2(b), 62 Stat. 3051-3052 (incorporating by reference International Refugee Organization (IRO) Constitution

---

(Cont'd)

> No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being *lawfully admitted for permanent residence*, within the United States for at least five years. . . .

8 U.S.C. § 1427 (emphasis added).

definition of "displaced person") (emphasis added). In addition, DPA § 13 prohibited the issuance of visas to "any person who is or has been a member of or participated in any movement which is or has been hostile to the United States or the form of government of the United States." 62 Stat. 1014. Section 10 of the DPA provided that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 62 Stat. 1013.

At the time of defendant's immigration in 1949, the issuance of visas were also governed by a State Department regulation which forbade the issuance of a visa to any alien "who has advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries during . . . [World War II]." 22 C.F.R. § 53.33(j).

Separate and apart from possession of a valid immigration visa, the INA established other prerequisites to the acquisition of United States citizenship at the time of defendants naturalization in 1955. Citizenship could be conferred only on persons who were "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." 8 U.S.C. § 1427(a)(3).

Finally, the INA § 340(a) provides that citizenship procured by willful concealment or misrepresentation of a material fact must be revoked. 8 U.S.C. § 1451.

C. The Complaint

Counts I-VI of the Complaint allege that defendant's citizenship was illegally procured and must therefore be revoked pursuant to § 340(a) of the INA. Specifically, Count I alleges

that defendant assisted in the persecution of civilians during World War II and was ineligible for immigration under DPA § 2(b). Count II alleges that defendant voluntarily assisted enemy forces during World War II and was ineligible for immigration under DPA § 2(b). Count III alleges that defendant's visa was invalid under DPA § 13 because he was a member during World War II of a movement hostile to the United States or the form of government of the United States during World War II. Count IV alleges that defendant's visa was invalid under DPA § 10 because he willfully misrepresented material facts when applying for admission to the United States as a displaced person. Count V alleges that defendant's visa was not validly issued because he "advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries" during World War II. 22 C.F.R. § 53.33(j). Count VI alleges that defendant is and has not been a person good moral character and was therefore ineligible under INA § 316(a)(3) for naturalization.

Count VII alleges that defendant's citizenship was procured by willful misrepresentation or concealment of material facts when applying for naturalization and must therefore be revoked pursuant to § 340(a) of the INA.

The relief sought under each count is the same: revocation of defendant's citizenship and cancellation of his Certificate of Naturalization.

II. EVIDENTIARY RULINGS

A. Motion to Withdraw Admissions

On October 28, 1993, the Government submitted to defendant its First Request for Admission and Second Interrogatories ("Request for Admission") pursuant to Fed. R.

Appendix D

Civ. P. 36. In the Request for Admission, the Government asked that defendant admit the authenticity and accuracy of translation of numerous documents, many of which dated from World War II.

Rule 36(a) provides that a party may serve any other party with a written request for admissions relating to "statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request." Fed. R. Civ. P. 36(a). If the party to whom the request is directed fails to respond within thirty days of service of the request, the matter is admitted. The admission may be withdrawn in accordance with Rule 36(b) which provides that: "Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action on the merits." Fed. R. Civ. P. 36(b).

At trial, defense counsel stated that his office had received the Request for Admission and that he had inadvertently failed to respond. Defendant then moved to withdraw the admissions pursuant to Fed. R. Civ. P. 36(b).[2] The Court deferred ruling on the Motion to Withdraw Admissions and directed the Government to proceed at trial as if the Motion had been granted.[3]

---

2. As it appears that defendant did not file his Motion to Withdraw Admissions or his Memorandum Re Withdrawal of Admissions with the Clerk of the Court, copies of those documents shall be docketed.

3. Although the Court ruled at trial that the relevant documents were properly authenticated by expert witness testimony under Fed. R. Evid. 901(b)(8), the Court addresses the Motion to Withdraw Admissions to clarify the record in the event of an appeal.

Normally, a motion to withdraw admissions is left to the discretion of the trial court. However, where, as in this case, the motion is made after the commencement of trial, the motion may only be granted to prevent "manifest injustice." *American Automobile Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1120 (5th Cir. 1991); *Farr Man & Co. v. M/V Rozita*, 903 F.2d 871, 876 (1st Cir. 1990).

Defendant's Motion to Withdraw Admissions will be granted. First, the Government will suffer no prejudice as a result of the withdrawal of the admissions. Testimony by expert witnesses authenticated the documents at trial and thereby eliminated the Government's need for an admission of authenticity. Second, the presentation of the merits will be substantially advanced by allowing the defense to withdraw the admissions. The Government's case was based almost entirely on World War II era documents and expert testimony regarding the contents of those documents. Under these circumstances, the Court concludes that it should make a finding as to the authenticity of the documents before reaching the merits of the case in preference to ruling that defendant has admitted authenticity by his failure to respond to the requests. Third, because the merits are so closely tied to the authenticity issue, granting the Motion and requiring the Government to authenticate the documents is necessary to prevent manifest injustice.

B. Ancient Documents and Multiple Hearsay

At trial, the Government presented a number of ancient documents, all of which were received in evidence pursuant to Fed. R. Evid. 901(b)(8) and 803(16)[4] with the exception of one

4. Because the documents were authenticated as ancient documents pursuant to Fed. R. Evid. 901(b)(8), the Court will not address the question whether the documents are self-authenticating foreign public documents under Fed. R. Evid. 902(3).

document, Government Exhibit 4.8, which raised an issue of hearsay within hearsay. The Court will now address the novel question raised by that exhibit.

Government Exhibit 4.8 is a report written in part by an officer named Marcinkus investigating the shooting of a Lithuanian Schutzmannschaft member named Valeika by another Schutzmannschaft member named Pagalys on October 29, 1941. In the report, Marcinkus recorded the statement of several witnesses including Valeika. Valeika stated that on the night of October 29th, he encountered members of the 3rd Battalion including Pagalys who boasted of robbing and shooting Jews earlier that day. Valeika chided the 3rd Battalion members and told them "not to say such things because it was a secret." An argument ensued and, later in the evening, Valeika was shot by Pagalys. The Marcinkus report also recited that Pagalys was a member of the 3rd Company of the 3rd Battalion, which was Stelmokas' unit at that time.

The Government sought to introduce the report to prove that the 3rd Company of the 3rd Battalion had participated in a massacre of Jews in Kaunas, Lithuania on October 29, 1941. The defendant objected on the grounds that the statement of Pagalys and the other Lithuanians who boasted of shooting and robbing Jews as well as the statement of Valeika who claimed to have heard the boast constituted hearsay within the ancient document and were not admissible under Fed. R. Evid. 805. The Government responded that all statements in an ancient document, including hearsay statements, are admissible under Fed. R. Evid. 803(16).

Federal Rule of Evidence 803(16) provides that "statements in a document in existence twenty years or more the authenticity of which is established" are admissible into evidence as an

exception to the hearsay rule. Under Fed. R. Evid. 805, hearsay within a hearsay statement is not admissible unless "each part of the combined statements conforms with an exception to the hearsay rule."

The Rule 803(16) exception is based on the rationale that authenticated ancient documents bear certain indicia of trustworthiness that favor admissibility. First, the age requirement generally assures that the document was drafted prior to the events giving rise to the litigation and before any motive for misrepresentation could arise. Second, the fact that the document is in writing minimizes the danger of mistransmission. Third, the document is more likely to be accurate than the oral testimony of the declarant based on his memory of events of twenty or more years ago. *See* 2 John W. Strong et. al., *McCormick on Evidence* § 322, at 359 (4th Ed. 1992); Charles E. Wagner, *Federal Rules of Evidence Case Law Commentary* 452 (1993); 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence*, ¶ 803(16)(01), at 803-354 (1994).

The Government argues that the language of 803(16) is sufficiently broad to provide an exception for statements made by the author of the ancient document and for hearsay statements within the document, and that the rationale underlying the ancient document hearsay exception applies equally to all such statements. According to the Government, both written and oral statements made many years before the commencement of the litigation in which they are offered in evidence are trustworthy because the declarant could not have had any interest in the litigation.

The Court concludes that the hearsay statements within the Marcinkus report are not admissible under Rule 805. As a general

matter, evidence admitted under the hearsay exceptions in Rule 803 remains subject to the multiple hearsay requirement of Rule 805. If the law were otherwise, Rule 805 would be rendered superfluous. More important, the Government's argument overlooks the fact that age is not the sole indicia of trustworthiness underlying the Rule 803(16) exception. The requirement that the ancient document be written generally guarantees that the fact finder possesses the statement of the document's author made more than twenty years ago without risk of mistransmission. However, there is no guarantee that a hearsay statement contained in the document is accurate. The author of the ancient document may have misheard or misunderstood the hearsay statement or his written words may not convey the meaning intended by the hearsay declarent. These issues of perception and narration are not merely peripheral but are fundamental problems of hearsay evidence. *See McCormick on Evidence* § 245, at 93. Consequently, hearsay statements contained within an ancient document lack the same indicia of trustworthiness and reliability that provide the rationale for admitting statements where the declarant is the author of the ancient document. It is for these reasons that the Court interprets Rule 803(16) as an exception to the hearsay rule only for statements where the declarant is the author of the ancient document. This ruling best gives effect to the combined purposes of Rules 803(16) and 805.

Although the Government has cited a number of decisions to support its interpretation of Rule 803(16), none of those cases involves an ancient document with multiple levels of hearsay. For instance, in *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961), a fifty-year old newspaper article which reported a fire in a courthouse was held admissible for the purpose of proving whether a fire actually occurred on

that day. The opinion does not reveal whether the article contained statements of any witness other than the reporter. Rather, it appears that it was the reporter's own account of the fire that was held admissible. *Id.* at 390. The problem of hearsay within hearsay was not an issue.

In this case, Marcinkus' statements based on personal knowledge are covered by the Rule 803(16) exception for ancient documents. However, the statements of Valeika and Pagalys are not covered by Rule 803(16) or any other hearsay exception and are therefore inadmissible under Rule 805. Because the report was offered for the sole purpose of proving the truth of the matter asserted in the statements of Valeika and Pagalys, the Court rules that Government Exhibit 4.8 is inadmissible.

C. Adverse Inference For Invocation of Fifth Amendment Privilege Against Self-Incrimination

In his Answer to the Complaint, defendant maintained that the Fifth Amendment privilege against self-incrimination prohibited the Government from compelling him to testify. *See* Answer to Complaint ¶¶12-17, 19-20, 25-26. By Memorandum and Order dated April 16, 1993, the Court ruled that defendant could not rely on the Fifth Amendment in refusing to answer allegations in the Complaint because he faced no real and substantial threat of prosecution and directed him to file an Amended Answer. Notwithstanding the Court's ruling, defendant did not file an amended answer and he repeatedly invoked the Fifth Amendment throughout his deposition on August 4, 1993. *See* Govt. Ex. 1.17 (deposition of defendant). Defendant did not testify at trial.

The Government asked the Court at trial to infer from

defendant's invocation of the privilege that his testimony would have been unfavorable to his interests. In response, defendant argues that he waived the privilege against self-incrimination at trial and that there should be no adverse inference from his earlier reliance on the privilege. According to defendant, the waiver occurred on the first day of trial when defense counsel stated in open court:

> I say to Your Honor, indulge us, if you will, until the time comes when we need to fish or cut bait on that [Fifth Amendment] issue, because at this moment, I don't guise know how I am going to advise this defendant to act in that respect. But I want to keep the option open and I want Your Honor to know, as well as Government counsel, that it is open and the Government does realize that we may waive the privilege . . . .

Transcript of Trial ("Tr."), Feb. 27, at 36.

A defendant may invoke the Fifth Amendment privilege against self-incrimination if his answer or testimony might incriminate him in future criminal proceedings. *See Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973). In civil cases, the finder of fact may infer from the defendant's invocation of the Fifth Amendment that his testimony would have been unfavorable to his interests. *See Baxter v. Palmiaiano*, 425 U.S. 308, 318 (1976).

The Court rejects defendant's claim that he waived his pleading of the Fifth Amendment at trial. By stating that "we may waive the privilege" as opposed to "we waive" or "we will waive" the privilege, defense counsel signalled to the Court and

to opposing counsel that defendant continued to invoke the Fifth Amendment. The Court also notes that defense counsel prefaced this statement by claiming that recent events in Lithuania supported defendant's belief that his testimony in this case could be used against him in a potential prosecution in that country. Furthermore, defendant's deposition, which was received in evidence without objection, is replete with instances of defendant's invocation of the privilege. Govt. Ex. 1.17 *passim.* The Court therefore concludes that it is permissible to draw an adverse inference against defendant.

Although defendant did not waive the privilege, thereby permitting the Court to draw adverse inferences, the findings of fact set forth in Part III.A-L of this Memorandum are not based on adverse inferences from defendant's invocation of the Fifth Amendment. However, the invocation of the Fifth Amendment in defendant's deposition provides independent and additional support for the Court's findings of fact. *See infra* Part III.M.

III. FINDINGS OF FACT

The case was tried to the Court sitting nonjury[5] from February 27 to March 3, 1995.[6] On the basis of the testimony and exhibits received in evidence, and considering that the Government has the burden of proving its case by evidence that is clear, unequivocal, and convincing so as not to leave the issue in doubt, the Court makes the findings of fact set forth below.

---

5. There is no provision for jury trials under INA § 340(a). In addition, because a denaturalization proceeding is an action in equity rather than common law, the Seventh Amendment right to a jury trial in suits at common law is inapplicable. *See Luria v. United States,* 231 U.S. 9, 27-28 (1913).

6. By agreement of the parties, closing argument was not necessary due to the thorough coverage of the issues in post-trial briefing.

Appendix D

A. Credibility Determinations

At trial, the Government presented the testimony of two expert witnesses, Dr. Raul Hilberg and Michael MacQueen, and two Holocaust survivors, David Levine and Abe Malnik, and offered numerous documents in evidence. The defense called no witnesses and moved three exhibits into evidence.

The Government's chief witness was Dr. Hilberg whose testimony consumed three full days of trial. Dr. Hilberg is an emeritus professor of political science at the University of Vermont and a renowned scholar specializing in the Holocaust. His principal academic publication is *The Destruction of the European Jews* (Quadrangle Books 1961). Dr. Hilberg served on the President's Commission on the Holocaust from 1978-79 and as a Presidential appointee to the United States Holocaust Museum Memorial Council from 1980-88. In addition, he has testified as an expert witness for the Government in ten previous denaturalizationproceedings against alleged former members of German or Germancontrolled paramilitary organizations. *See, e.g., United States v. Kungys,* 571 F. Supp. 1104 (D.N.J. 1983), *rev'd,* 793 F.2d 516 (3d Cir. 1986), *rev'd,* 485 U.S. 759 (1988); *United States v. Kowalchuk,* 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd,* 773 F.2d 488 (3d Cir. 1985), *cert. denied,* 475 U.S. 1012 (1986); *United States v. Koziy,* 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd,* 728 F.2d 1314 (11th Cir.), *cert. denied,* 469 U.S. 835 (1984); *United States v. Osidach,* 513 F. Supp. 51 (E.D. Pa. 1981).

The Court finds Dr. Hilberg to be a compelling witness. In addition to his authoritative command of the history of the Holocaust, Dr. Hilberg displayed a remarkably detailed knowledge of the individual documents that were presented in this case. His explanation of what the documents revealed (and

did not reveal) about the career path of Jonas Stelmokas was both insightful and judicious. Dr. Hilberg's testimony will therefore be accorded considerable weight.

Defendant attempted to cast doubt on the trustworthiness of the many documents in evidence that were stored in the archives of the former Soviet Union. Although, as mentioned *supra*, the Court has ruled that the archival documents were properly authenticated under Rule 901(b)(8), the trustworthiness argument also presents a credibility issue for the finder of fact in weighing the evidence. The Court finds that defendant's sweeping claim that documents in Soviet archives are not trustworthy because "the Russians . . . falsified historical events" is without merit. The Government's expert witnesses, Dr. Hilberg and Mr. MacQueen, both testified that the documents received in evidence in this case appeared entirely authentic and were not the product of Soviet fabrication. Mr. MacQueen personally handled the originals of many of the documents and stated that he had no doubts as to their authenticity. Dr. Hilberg testified he was not aware of a single instance of a World War II archival document pertaining to the Holocaust that was a Soviet forgery. Tr., Feb. 27, at 49. He further stated that documents in Soviet archives are often in more pristine condition than their Western counterparts due to the lack of access to Soviet archives during the Cold War. The Court concludes that the Government has amply established the authenticity and trustworthiness of the documents in evidence.

B. Events Prior to German Occupation of Lithuania

1. Defendant Jonas Stelmokas was born on August 20, 1916 in Moscow, Russia.

2. Defendant's father, who was also named Jonas

Stelmokas, was born in Jundeliskes, Lithuania at an unknown date. Defendant last saw his father prior to World War II when his father was residing in the Alytus district of Lithuania.

3. From 1936 until 1939, defendant attended the military academy in Kaunas, Lithuania. Defendant was the only member of his military academy class with the surname "Stelmokas." Govt. Ex. 1.17 at 36.

4. Upon graduation from the military academy in 1939, defendant was commissioned as a second lieutenant, or junior lieutenant, in the 2d Regiment of Infantry of the Lithuanian army. Govt. Ex. 1.17 at 38, 40. Defendant remained a second lieutenant in the 2d Regiment of Infantry at the time that Lithuania was annexed by the Soviet Union in 1940.

5. During the Soviet occupation of Lithuania, the Lithuanian army was incorporated into the Soviet Red Army. Defendant thereby became a second lieutenant in the Red Army in a unit known as the 29th Lithuanian Territorial Rifle Corps. While serving in the Red Army, defendant was assigned to Vilnius, Lithuania.

C. German Invasion and Occupation of Lithuania

6. On June 22, 1941, German armed forces invaded Soviet-controlled territory including Lithuania. The Red Army retreated from the German attack and withdrew from Lithuania. Although some Lithuanian soldiers joined the retreat, many became "partisans" who attacked the Red Army. Tr., Feb. 27, at 115.

7. By the afternoon of June 24, 1941, German forces entered Kaunas which at that time was the Lithuanian capital. Within one week, all of Lithuania was under German occupation.

Appendix D

8. As the German Army moved into Soviet-occupied territory, it was followed by mobile units of German police known as Einsatzgruppen. The Einsatzgruppen implemented the German policy of destroying the Jews, later known as the Final Solution to the Jewish Question, in such territory.

9. Each Einsatzgruppe was approximately the size of one battalion and contained subunits known as Einsatzkommandos and Sonderkommandos. Einsatzgruppe A, commanded by SS Brigadefuhrer Dr. Stahlecker, was the Einsatzgruppe for the area including Lithuania and the other Baltic states. Beginning in early July of 1941, the subunit of Einsatzgruppe A responsible for the area including Lithuania was Einsatzkommando 3 commanded by SS Colonel Karl Jager. Tr., Feb. 27, at 55-59.

10. Einsatzkommando 3 employed various methods for killing the Jewish population of Lithuania. First, it instigated the indigenous populations to carry out pogroms against the Jews. Second, a rollkommando, or rolling detail, of eight to ten men traveled throughout Lithuania executing Jews in numerous locales. In addition, the Jewish population in certain cities was moved into ghettos where they were essentially incarcerated. In Kaunas, the Jewish populations was required to move into the designated ghetto by August 15, 1941. Tr., Feb. 27, at 58-59, 104, 110, 113-14; Govt. Ex. 4.11.

11. Einsatzkommando 3 relied in part on assistance from the indigenous Lithuanian population. At first, such assistance came from Lithuanians who, at the behest of the Germans, carried out pogroms. Later, as the German Army came to view such actions as a threat to public order, Lithuanian assistance was provided in the form of organized military units under German control. Tr., Feb. 27, at 114, 119-20.

Appendix D

12. Shortly after the German invasion, Lithuanian nationals attempted to organize an independent Lithuanian army. However, the German government forbade the formation of independent Lithuanian military units. Consequently, the Lithuanians who had planned to create or join the Lithuanian army were effectively unemployed. Tr., Feb. 28, at 12.

13. Because the German military disapproved of any independent Lithuanian military, the German government further decided that armed Lithuanian "partisans" should be formally brought under German control. Tr., Feb. 27, at 123, 136.

14. In late June of 1941, a military unit composed of "reliable" Lithuanian partisans selected by the Germans was organized in Kaunas. This unit was known as the Battalion for the Defense of National Labor. Tr., Feb. 27, at 119-20, 135-36.

15. The Battalion for the Defense of National Labor, which was later divided into several "auxiliary police battalions," eventually became known in German as the "Schutzmannschaft" which may be translated as "protective force." *See, e.g.*, Tr., Feb. 27, at 153.

16. Service in the Schutzmannschaft was voluntary. The Schutzmannschaft sought out volunteers by use of a recruitment process in which officers were assigned the task of signing up new members. Tr., Feb. 27, at 142, 150-51.

17. All officers in the Schutzmannschaft served voluntarily, at least in 1941. The abundant supply of officers obviated any need for conscription. Tr., Feb. 27, 157, 160.

18. The Schutzmannschaft were effectively under German

control. Every Schutzmannschaft battalion had a German supervisory officer. The Germans prescribed the pay, the uniforms, and the weapons that were issued to Schutzmannschaft members and maintained control over the deployment of Schutzmannschaft units. Tr., Feb. 27, at 141.

19. Beginning some time in 1941, members of the Lithuanian Schutzmannschaft were required upon enlistment and reenlistment to swear an oath of allegiance to Adolf Hitler. Tr., Feb. 27, 149-53. Persons who took the oath swore that they were enlisting in the Schutzmannschaft "in order to create a new Europe under the leadership of the Fuhrer of the Greater German Reich, ADOLF HITLER. . . ." Govt. Ex. 4.133; *see also* Govt. Ex. 4.132. The oaths of enlistment were for periods of six months or one year. Tr., Feb. 27, at 149.

20. It is not known when the oaths of enlistment were first administered. Although use of the oaths began some time in 1941, there is no evidence of the use of oaths in June or early July of 1941. Tr., Feb. 27, at 149.

21. Schutzmannschaft members were paid for their service. Married Schutzmannschaft members received special family pay. All members were allowed paid leaves of absence. Both enlisted men and officers in the Schutzmannschaft were armed. Tr., Feb. 27, at 161-62.

22. In general, the duties of the Schutzmannschaft included guarding installations such as bridges, ammunition depots,public buildings, and radio stations, as well as prisoners and the Kaunas ghetto. Tr., Feb. 28 at 9. The Schutzmannschaft also fought anti-German partisans, and assisted Einsatzkommando 3 in shooting operations of Jews and other persons. Tr., Feb. 27 at 162-63.

Appendix D

D. Chronology of Defendant's Military Service

23. At the time of the German invasion in June 1941, defendant was in the area of Vilnius, Lithuania. Defendant did not join the retreating Red Army but remained in Vilnius.

24. Defendant attempted to join the planned independent Lithuanian army. Because the German government forbade the formation of an independent Lithuanian military, defendant was unemployed. A document dated July 22, 1941 shows defendant sought employment in "Railway Police or administration" in Vilnius. Govt. Ex. 4.1; Tr., Feb. 28, at 12.

25. On July 28, 1941, defendant joined the Battalion for the Defense of National Labor in Kaunas and was appointed to the position of platoon commander in the 7th Company. Govt. Ex. 4.241.

26. Defendant's decision to serve in the Battalion for the Defense of National Labor was voluntary. Tr., Feb. 27, at 160.

27. When the Battalion for the Defense of National Labor was divided into several auxiliary police battalions in August 1941, defendant became a member of the First Auxiliary Police Service Battalion. Govt. Ex. 4.2; Tr. Feb. 28, at 20. Defendant was subsequently transferred to the Third Auxiliary Police Service Battalion effective September 1, 1941. Govt. Ex. 4.3. At that time, defendant became a platoon commander in the 3rd Company of the 3rd Battalion. Govt. Ex. 4.2.

28. The Lithuanian Auxiliary Police Service Battalions eventually became known as the Schutzmannschaft. Tr., Feb. 27, at 153.

29. Defendant served in the 3rd Battalion from September 1, 1941 until February 1942. Tr., Feb. 28, at 148.

30. From August 21 to September 4, 1941, defendant was assigned to recruit volunteers in the town of Marjampole for the Schutzmannschaft. Tr., Feb. 27, 142-48.

31. On December 13, 1941, defendant was elected to membership in an organization called Ramoves, which was a club composed of members of the 3rd Battalion. Govt. Ex. 4.62.

32. In February 1942, the 3rd Battalion was renumbered as the 11th Battalion. Govt. Ex. 4.243; Tr., Feb. 28, at 148. Defendant subsequently became a lieutenant in the 11th Battalion. Tr., Feb. 28, at 149.

33. Defendant served in the 11th Battalion at least through March 19, 1943. On that date, defendant's title was changed from lieutenant to "lieutenant of the Schutzmannschaft." Govt. Ex. 4.12. The change was in name only and did not reflect a change in rank or responsibility. Tr., Mar. 1, at 144.

34. At some point in the Spring of 1943, defendant was transferred from the 11th Schutzmannschaft Battalion to the 9th Schutzmannschaft Battalion in Kaunas. He was then transferred on May 24, 1943, from the 9th Battalion to the 253rd Schutzmannschaft Battalion in Prienai, Lithuania. Govt. Ex. 4.13.

35. Some time before November 4, 1943, defendant became acting deputy commander of the 3rd Company of the 253rd Battalion. Govt. Ex. 4.74; Tr., Feb. 28, at 152. It is not clear from the documents whether defendant was subordinate to a

company commander. However, for at least some periods, defendant was clearly responsible for assuring that the company executed the orders of the battalion commander. Tr., Mar. 1, at 157, 160.

36. By no later than May 1944, defendant had been promoted to commander of the 3rd Company of the 253rd Battalion. Govt Ex. 4.224; Tr., Feb. 28, at 154; *see also* Govt. Ex. 4.73; Tr., Feb. 28, at 156.

37. By mid-1944, the Red Army advanced upon, and eventually recaptured, Lithuania. The various Schutzmannschaft battalions were redeployed or disbanded. Tr., Feb. 28, at 165-66.

38. By August 30, 1944, defendant was transferred to Zingst, Germany, where he served in the 5th Company of the 91st Light Flak Replacement Unit of the Luftwaffe. Govt. Ex. 4.221; Tr., Feb. 28, at 166.

39. A German document identifying members of the 5th Company lists Stelmokas as a Lithuanian born on August 24, 1916, with a father named Jonas Stelmokas residing in "Jundeliskiai, Alytus District." Govt. Ex. 4.221.

40. Defendant remained in the 91st Light Flak Replacement Unit as late as February 12, 1945, when he was treated for gonorrhea at a military hospital in Rotenburg, Germany. Govt. Ex. 4.222; Tr., Feb. 28, at 168.

E. "Secret Mission" of September 11-13, 1941

41. Government Exhibit 4.5 is a battalion order of the 3rd Schutzmannschaft Battalion dated September 19, 1941.

Paragraph two of that order contains the following statement: "3rd Company Lieutenant ANTANAS GUDELIS and Second Lieutenant JONAS STELMOKAS are being sent to the provinces on a secret mission from 6:00 a.m. on 11 September of the current year until 7:30 p.m. on the 13th."

42. Paragraph seven of the battalion order named thirty-three enlisted soldiers from the 3rd Company who "are being sent on a secret mission from 6:00 a.m. of the 11th day of the current month until 7:30 p.m. of the 13th day." Govt. Ex. 4.5.

43. Lithuanian Schutzmannschaft military orders normally disclosed the objective of a mission unless it involved matters not intended to be revealed to anyone other than persons immediately involved in the mission. Tr., Feb. 28, at 38-39. Dr. Hilberg opined that the "secret mission" in the battalion order of September 19, 1941, referred to the arrest or shooting of people or both, *id.* at 40, but he did not testify whether or not it could have referred to other types of secret operations.

44. Dr. Hilberg opined that the thirty-three soldiers listed in paragraph seven of the battalion order were the members of the platoon commanded by Stelmokas. That opinion was based upon these facts: thirty-three soldiers would not be sent on a mission without a commanding officer, thirty-three soldiers was the approximate size of a platoon, Stelmokas was a platoon commander, and Gudelis was company commander and not a platoon commander. Tr., Feb. 28, at 38.

45. Dr. Hilberg opined that the secret mission conducted by Stelmokas and his platoon involved killings recorded in the Jager Report which is a document authored by Colonel Jager, the commander of Einsatzkommando 3. Tr., Feb. 28, at 44. The

Appendix D

Jager Report describes the methodology of Einsatzkommando 3 in eliminating the Jewish population of Lithuania and contains a list of executions in Lithuania from July 2 until December 1, 1941. Govt. Ex. 4.11.

46. For the days of September 11 and 12, 1941, the Jager Report lists executions in four different towns in Lithuania. The Report records that on September 11, 1941, one hundred fifty-five (155) Jews were killed in the town of Leipalingis and nine hundred fifty-three (953) Jews were killed in the town of Seirijai. An additional four hundred fourteen (414) Jews were killed on September 12, 1941, in Simnas. The Report also records that on September 11-12, 1941, forty-three (43) inhabitants of Uzusalis were killed in a "[p]unitive action against inhabitants, who have aided Russian partisans and who, in part, possessed weapons." Govt. Ex. 4.11.

47. The Court finds that the veiled reference in the battalion order to a "secret mission" and Dr. Hilberg's testimony on the subject do not establish by clear, unequivocal, and convincing evidence that defendant participated on September 11-13, 1941 in the massacres recorded by Colonel Jager or in any other killings. Of significance is the fact that the Government did not ask Dr. Hilberg whether other Schutzmannschaft or German units could have carried out the killings listed in the Jager Report or whether "secret mission" could have referred to anything other than arresting and killing civilians.

48. The Court finds that the Government has not met its burden of proving by clear, unequivocal, and convincing evidence that defendant participated in the killing of Jews or other civilians as part of the "secret mission" of September 11-13, 1941.

Appendix D

F. "Guard Commander in Vilijampole"

49. An order of the 3rd Battalion dated September 15, 1941, lists Junior Lieutenant Stelmokas as "Guard Commander in Vilijampole" for September 16. Govt. Ex. 4.35.

50. "Vilijampole" refers to the Kaunas ghetto or, alternatively, the ghetto and the immediately adjacent neighborhood. Tr., Feb. 28, at 82 (testimony of Dr. Hilberg); Tr., Mar. 1, at 122-23 (same); Tr., Mar. 2, at 23 (testimony of survivor David Levine); *Id.* at 145 (survivor testimony of Abe Malnik).

51. The duty of guarding "Vilijampole" involved guarding the ghetto regardless of whether "Vilijampole" referred to the ghetto alone or to the ghetto and the adjacent area. Therefore, the battalion order of September 15, 1941, assigned Stelmokas the duty of commanding the ghetto guard. Tr., Feb. 28, at 71, 82.

52. Ghetto guard duty was a 24-hour assignment commencing at 1:00 p.m. Defendant's assignment therefore began at 1:00 p.m. September 16 and ended at 1:00 p.m. September 17, 1941. Tr., Feb. 28, at 73, 83.

53. The ghetto guard enforced the confinement of approximately thirty thousand Jews in ghetto. As commander of the guard, defendant was responsible for ensuring that Jews did not escape the ghetto and that unauthorized persons did not enter. Tr., Feb. 28, at 83.

54. Living conditions in the ghetto were brutal. The Ghetto was severely overcrowded and lacked basic sanitation. Parts of

the Ghetto lacked water supply. Tr., Mar. 2, at 28. Jews were limited to one hundred grams of bread, some potatoes, and frozen cabbage per person per day. At the same time, they were forced to perform manual labor for the Germans including the construction of a military airfield. Tr., Mar. 2, at 30-32.

55. Shootings of Jews in the ghetto by Lithuanian guards were a regular occurrence. One witness said that Lithuanian Schutzmannschaft members shot Jews so frequently that he thought they were using Jews for target practice. Tr., Mar. 2, at 36.

56. A report dated September 18, 1941, by the ghetto police chief to the Jewish Council of Elders relates the shooting deaths of two ghetto residents — Base Feigelmaniene-Satinskaite and Ester Bavarskiene-Joselyte — on September 17 before noon. Govt. Ex. 4.236.

57. A report dated September 17, 1941, by the ghetto police chief to the Jewish Council of Elders states that a woman named Keilie Segaliene and her child were shot and wounded at 9:30 p.m. on September 16. Govt. Ex. 4.235.

58. The shootings could have been carried out by the ghetto guard or by Germans. As a general rule, the ghetto guard and the Germans were the only armed persons allowed in the ghetto. Members of the Jewish ghetto police did not bear arms. Tr., Feb. 28, at 85.

59. At least some killings in the ghetto were carried out by Germans. For instance, Germans personally enforced the rule that any Jew who failed to step off the sidewalk and remove his hat when a German passed by had to be shot. Tr., Mar. 2, at 33.

60. The Court finds that the Government has not established by clear, unequivocal, and convincing evidence that the shootings on September 16-17, 1941 were carried out by either the defendant or Schutzmannschaft members under his command. However, the Government has established by clear, unequivocal, and convincing evidence that defendant was commander of the ghetto guard for a 24-hour period commencing September 16, 1941, at 1 p.m., that Jews in the ghetto were subject to extreme deprivation, brutality, and arbitrary shootings during that period, and that defendant was responsible for enforcing the confinement of Jews in such conditions.

G. Grosse Aktion of October 28-29, 1941

61. On October 28-29, 1941 in Kaunas, Germans from Einsatzkommando 3 aided by the Lithuanian Schutzmannschaft executed nine thousand two hundred (9,200) Jews, including two thousand seven (2,007) adult males, two thousand nine hundred twenty (2,920) adult females, and four thousand two hundred seventy-three (4,273) children. This operation became known as the Grosse Aktion or "Great Action."

62. The purpose of the Grosse Aktion was to cleanse the ghetto of all Jews except for laborers and their immediate families. Govt. Ex. 4.11 at 7, 25; Tr., Feb. 28, at 91.

63. The Grosse Aktion commenced in the early morning of October 28, 1941, when all Jews in Kaunas were required to leave the doors of their houses and the drawers of their furniture open and report to an open area referred to as Democracy Square. In Democracy Square, the Jews were lined up in columns by the Jewish Ghetto Police and then passed before a German named Helmut Rauca who selected which Jews were fit for labor

and which ones were not. Govt. Ex. 4.237; Tr., Feb. 28, at 112-13; Tr., Mar. 2, at 48-50.

64. The Jews who were considered fit for labor and their families were permitted to return to their homes. Govt. Ex. 4.237; Tr., Feb. 28, at 112-13.

65. The other Jews were sent to the "small ghetto" which was located north of the main ghetto. Govt. Ex. 4.248 (map of the Jewish ghettos); Tr., Mar. 2, at 41, 46.

66. On October 29, 1941, beginning at 5:30 a.m. and continuing throughout the day, the Jews who had been culled from the main ghetto and placed in the "small ghetto" on the previous day were marched under armed guard to Fort IX which was one of a number of fortifications encircling the city of Kaunas. Tr., Feb. 28, at 114.

67. At Fort IX, the Jews were shot to death and buried in pits. Tr., Mar. 2, at 179-80.

68. At the time of the Grosse Aktion, German and Schutzmannschaft units other than the 3rd Battalion were deployed in Byelorussia thereby creating a "shortage of manpower." The participation of the 3rd Battalion was therefore necessary to the Grosse Aktion. Tr., Feb. 28, at 137.

69. The magnitude of the Grosse Aktion required the participation of an entire battalion of Lithuanian Schutzmannschaft. "A battalion of roughly five hundred, even augmented with some Germans, would have been barely capable of accomplishing the objective, which was the killing of these 9200 people." Tr., Feb. 28, at 137 (testimony of Dr. Hilberg).

Appendix D

The Germans at times used forces larger than one battalion to perform massacres of less than ten thousand people. Tr., Feb. 28, at 138.

70. The size of the force required for a mass killing operation depended on various factors such as the configuration of the terrain, the number of Jews to be executed, and whether resistance from the Jewish was anticipated. However, assuming that no resistance was anticipated in the Grosse Aktion and accounting for the participation of the German Order Police and the Jewish Ghetto Police, an entire Schutzmannschaft battalion, at a minimum, was required for the Grosse Aktion. Tr., Feb. 28, at 138-39.

71. Two Jewish survivors of the Kaunas ghetto testified at trial that Lithuanians in military uniform participated in the Grosse Aktion.

72. David Levine, who was twelve years old at the time of the Grosse Aktion, recalled that the Jews who gathered at Democracy Square were surrounded by armed Lithuanians. Tr. Mar. 2 at 52-53. Mr. Levine testified that he, his mother, and his father were permitted to return home. On the morning of October 29, 1941, Mr. Levine walked out to the small ghetto and saw armed Lithuanians guarding the Jews incarcerated in the small ghetto. Jews in the small ghetto who tried to escape were shot by Lithuanians. Other Jews attempted to save their infant children by throwing them over the fence surrounding the small ghetto. Tr., Mar. 2 at 57.

73. Abe Malnik, who was fourteen years old at the time of the Grosse Aktion, testified that armed Lithuanians surrounded the ghetto and were present in Democracy Square during the

selection on October 28, 1941. Mr. Malnik, along with his mother, grandmother, and great-aunt, was selected for execution at Fort IX. After the selection, they were pushed by armed Lithuanians toward the small ghetto. When Mr. Malnik attempted to explain to a Lithuanian guard that he and his family should not be executed because his father was a member of the Jewish fire brigade and therefore an essential worker, the guard beat him and his mother. Afterwards, during the night of October 28, Lithuanian guards at the fence bordering the small ghetto began firing bullets into the air around the selected Jews to intimidate them and prevent them from escaping. The next day, the Lithuanians escorted the Jews as they were marched up to Fort IX. Mr. Malnik said he heard the noise of machine gun fire coming from Fort IX. Tr., Mar. 2, at 172-81.

74. Mr. Malnik and his mother were saved from execution when his father, who was outside the small ghetto helping a German officer to revive a woman who had fainted, beseeched the German to rescue his family. Another German present at the scene stated that Mr. Malnik's father was a good worker, and therefore, he was permitted to pull his son and his wife from the small ghetto. Tr., Mar. 2, at 177-79.

75. Both Messrs. Levine and Malnik testified that the Lithuanians and the Germans were clearly distinguishable from each other, partly on the basis of the color of uniforms and their military insignia. Tr., Mar. 2, at 35; *Id.* at 135-38.

76. The Jager Report recounts that "[t]he actions in Kaunas itself, where there were sufficient reasonably well-trained partisans available, were virtually duck shoots compared with the enormous difficulties which were often encountered elsewhere." Govt. Ex. 4.11 at 30.

Appendix D

77. The "well-trained partisans" described by Colonel Jager referred to the Schutzmannschaft. *See, e.g.*, Tr., Mar. 1 at 28, 30.

78. As a general matter, Lithuanian Schutzmannschaft participation in executions included arresting the victims, guarding them, marching them to the execution sites, and shooting them. Tr., Feb. 28, at 6.

79. A battalion order dated October 25, 1941, assigned the task of battalion duty officer to "Junior Lieutenant STELMOKAS" beginning October 26. Govt. Ex. 4.9.

80. The daily battalion orders from October 24 through October 29, 1941, do not state that Junior Lieutenant Stelmokas took a leave of absence at any time in that period. The orders do report other battalion members departing on and returning from leaves of absence. Govt. Exs. 4.47-4.53.

81. The record contains no written order pertaining to the Grosse Aktion of October 28-29, 1941. Dr. Hilberg testified that he is not aware of the existence of any such written orders. Tr., Feb. 28, at 115. He added that the absence of written orders was not unusual because the deployment of the Lithuanian Schutzmannschaft could have been accomplished entirely by oral orders as in a battlefield situation. Tr., Feb. 28, at 115-16.

82. The entire 3rd Schutzmannschaft Battalion, in which Stelmokas was serving at that time, participated in the Grosse Aktion. Tr., Feb. 28, at 137.

83. It would be "totally unreasonable" to conclude on the basis of the documents admitted into evidence that Stelmokas

and his platoon did not participate in the Grosse Aktion. Tr., Feb. 28, at 138 (testimony of Dr. Hilberg).

84. The Court finds that the Government has proved by clear, unequivocal, and convincing evidence that the defendant's battalion participated in the Grosse Aktion and that defendant was on-duty at that time.

H. Service in 253rd Schutzmannschaft Battalion

85. Defendant served in the 253rd Schutzmannschaft Battalion from at least May 1943 to May 1944.

86. At trial, portions of war diaries of the 3rd Company of the 253rd Schutzmannschaft Battalion during the time defendant was serving in that Company were received in evidence. Govt. Exs. 4.72-4.74, 4.76. Two of the war diaries were signed by defendant. Govt. Exs. 4.74 & 4.224; Tr., Mar. 1, at 68 (stipulation of authenticity of defendant's signature on documents).

87. Defendant authored a series of diary entries for the dates April 1 to April 10, 1944, as "Acting Deputy Commander, 3rd Company." Govt Ex. 4.74. In those diary entries, Stelmokas reports that the company carried out an order from the battalion commander to arrest unidentified people and search their dwellings for weapons. Stelmokas also states that some members of the company were sent out to arrest Polish partisans who were fighting against the Germans. The company also guarded a peat bog located ten kilometers southwest of Vilnius. *Id.*; Tr., Feb. 28, at 160.

88. Another series of war diary entries for the 253rd Battalion authored by Stelmokas relate that on May 28, 1944,

his company fired 818 bullets and five grenades during a skirmish with an unidentified enemy. The diary entry for that date mentions railroad tracks being blown up by partisans. Govt. Ex. 4.224; Tr., Mar. 1, at 169. These and other diary entries show that one of the primary duties of the 253rd Battalion was fighting anti -German partisans. Tr., Feb. 28, 159-60; Tr., Mar. 1, at 166, 169.

89. The partisans whom Stelmokas and his company searched for and fought against were anti-German partisans. These partisans included some Lithuanians as well as Byelorussians, Jews, and Poles. Tr., Feb. 28, at 160.

90. Two of the diary entries not recorded by Stelmokas note attempts by the company on April 24-25, 1944, to capture Jews who had escaped from a labor camp at "Zysmory" or "Ziezmariai." Govt. Exs. 4.72 & 4.76; Tr., Feb. 28, at 161. However, the diary entries do not disclose whether defendant was on duty at the time. Tr., Mar. 1, at 167 (testimony of Dr. Hilberg).

91. The 253rd Battalion seized individuals to serve as forced labor in Germany. Tr., Feb. 28, at 159. However, the Government did not present evidence that defendant had any involvement in or awareness of these acts.

I. Service in the Luftwaffe

92. Defendant served in the 91st Light Flak Replacement Unit of the Luftwaffe from at least August 1944 to February 1945. While in that unit, he was confined for some time in a German military hospital. Tr., Mar. 1, at 176.

Appendix D

J. Immigration: Application to Displaced Persons Commission in or about July 1949

93. In or about July 1949, defendant sought a determination from the United Stated Displaced Persons Commission that he was a displaced person as defined in the DPA and therefore eligible to emigrate to the United States. Govt. Ex. 1.1 at 26-27; Complaint I 18; Answer to Complaint a 18.

94. In connection with his application, defendant was interviewed by a DPC analyst on or about July 8, 1949. Following the interview, the DPC analyst wrote and filed a report summarizing the relevant information pertaining to defendant's history. Govt. Ex. 1.14.

95. The report states:

> that the Applicant was an officer in the Lithuanian Army at Kaunas from August 1939 until July 1940. Then was discharged and worked as a teacher at Seda, Lithuania, until August 1943. He resided unemployed at Kaunas until July 1944, when he was forced out by the approaching front;
>
> that the Applicant worked as a laborer at Dresden, Germany, until March 1945;
>
> that the Applicant travelled to Rotenburg, Germany, and entered the DP-Camp Rotenburg in May 1945.

Govt. Ex. 1.14. The report makes no other reference to defendant's wartime activities.

Appendix D

96. The report also concludes that defendant was "of good character and behavior," that he "is and has not been a member of, or participated in, any movement which is or has been hostile to the United States or the form of Government of the United States." Govt. Ex. 1.14.

97. The report concluded that defendant was a displaced person as defined in Annex 1 of the IRO Constitution and was eligible for admission into the United States under the DPA. Defendant was then certified as a displaced person by the DPC on July 8, 1949. Govt. Ex. 1.14.

98. The description contained in the DPC report of defendant's employment and residence during World War II is false.

99. Defendant was not a teacher in Seda, Lithuania from July 1940 to August 1943, was not unemployed in Kaunas from August 1943 to July 1944, and did not work as a laborer in Dresden from 1943 to March 1945. In fact, defendant was an officer in the Red Army from mid-1940 until June 1941, was unemployed briefly in June and July 1941 in Vilnius, was an officer in the German-controlled Brigade for the Defense of National Labor in July and August of 1941, was an officer in the Schutzmannschaft from August 1941 to mid-1944, and was a member of a unit of the Luftwaffe from at least August 1944 to February 1945.

100. Defendant did not inform the DPC analyst of his Schutzmannschaft and Luftwaffe service. Defendant misrepresented and concealed his employment and place of residence for the period of July 1940 to March 1945.

Appendix D

101. The Lithuanian Schutzmannschaft appeared on a "List of Organizations Considered Inimical to the United States" issued by the DPC Headquarters in Frankfurt, Germany. Govt. Ex. 4.242. This list was in effect during the period in 1949 relevant to defendant's immigration. *See* Tr., Mar. 3, at 3 (stipulation).

K. Immigration: Application for Visa and Interview with United States Vice-Consul in August 1949

102. On or about August 10, 1949, defendant applied for a visa to enter the United States by submitting an Application for Immigration and Alien Registration, Form 256a, to the United States consulate in Hamburg, Germany. Govt. Ex. 1.1 at 30.

103. In connection with his visa application, defendant was interviewed by a United States vice-consul. During this interview, defendant orally swore that he resided in Seda, Lithuania from 1940 to 1943, in Kaunas from 1943 to 1944, and in Dresden from 1944 to 1945. Defendant's statement, which he affirmed by oral oath, was false. Defendant lived in Kaunas, not Seda, from 1940 to 1943. Defendant lived in Prienai, Lithuania, not Kaunas, from 1943 to 1944.

104. Defendant never informed the vice-consul of his service in the Schutzmannschaft and the Luftwaffe.

105. Based on information contained in the DPC report and his own interview of defendant, the vice-consul approved defendant's application for an immigration visa on August 10, 1949. Govt. Ex. 1.1.

106. Defendant entered the United States on August 31,

1949, as a permanent resident and displaced person under the DPA.

L. Naturalization on April 11, 1955

107. On November 12, 1954, defendant filed with the INS an Application to File Petition for Naturalization along with a Statement of Facts for Preparation of Petition. Together, the two documents comprise INS Form N-400. Govt. Ex. 1.4; Complaint ¶ 29; Answer to Complaint ¶ 29.

108. On February 16, 1955, defendant swore under oath and in the presence of an INS examiner that he knew the contents of his Form N-400 and that the information therein was true to the best of his knowledge and belief. Complaint P 30; Answer to Complaint ¶ 30.

109. On February 16, 1955, defendant filed and swore to the truthfulness of his Petition for Naturalization, Form N-405. Govt. Ex. 1.3.

110. On April 11, 1955, the United States District Court for the Eastern District of Pennsylvania granted defendant's Petition for Naturalization and issued to him Certificate of Naturalization No. 7490987. Govt. Ex. 1.2.

(1) Question 9 of Form N-400

111. Question 9 of Form N-400 asked "What organization in the United States or in any other country have you been a member of before the last 10 years?" Defendant's response to this question was "Boy Scouts — In Lithuania." Govt. Ex. 1.4.

112. Form N-400 does not define the term "organizations";

however, INS Form G-135 explains the term as "societies, clubs, etc., with which . . . affiliated." *See* Govt.Ex. 1.6. As such, "organizations" does not appear to refer to military service or employment.

113. Question 9 of Form N-400 did not clearly and unequivocally require defendant to disclose his military service or employment in order to answer truthfully.

114. Regardless of how "organizations" is defined, the Government has not demonstrated by clear, unequivocal, and convincing evidence that defendant knew that question 9 required him to list his military service and that he willfully concealed such service.

115. Defendant was a member of a group of the 3rd Schutzmannschaft Battalion known as Ramoves. *See* Findings of Fact ¶ 31, *supra.*

116. Defendant did not disclose his membership in Ramoves in response to question 9 on Form N-400. However, the evidence does not establish the nature of Ramoves. It is not clear whether Schutzmannschaft members viewed Ramoves as a social club or simply as one aspect of their military service.

117. The evidence does not establish clearly, unequivocally, and convincingly that defendant knew question 9 required him to disclose his a membership.

(2) Question 18 of Form N-400

118. Question 18 of Form N-400 reads in relevant part as follows: "The law provides that no person shall be regarded as

a person of good moral character who, *during the period of residence required for naturalization*, . . . has given false testimony for the purpose of obtaining any benefits under the immigration and naturalization laws. . . . Have you at any time, either within or outside the United States, ever been or ever committed any of these things or acts?" Defendant responded "No" to this question. Govt. Ex. 1.4 (emphasis added).

119. "False testimony" is a false oral statement given under oath. *United States v. Kunays*, 485 U.S. 759, 780 (1988) (" '[T]estimony' is limited to oral statements made under oath.").

120. The Complaint does not allege and there is no evidence that defendant made any statement under oath to the DPC analyst in 1949. Therefore, his statement to the DPC analyst was not testimony.

121. Question 18 of Form N-400 did not require defendant to disclose his misrepresentations to the DPC analyst.

122. Defendant falsely represented under oath his wartime residence to the vice-consul in Hamburg, Germany in August 1949. *See* Findings of Fact ¶ 103, *supra.*

123. Question 18 does not make clear whether it required disclosure of false testimony given at any time or only during the time following defendant's arrival in the United States on August 31, 1949.

124. Defendant may have interpreted question 18 to refer only to the period of time following his arrival in the United States on August 31, 1949.

125. The evidence does not clearly, convincingly, and unequivocally establish that defendant's response to question 18 constituted willful concealment or misrepresentation.

(3) Item 15 of Form N-405

126. At item 15 of Form N-405, defendant swore as follows: "I am, and have been during all the periods required by law, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States." Govt. Ex. 1.1 at 3-4.

127. Neither item 15 nor Form N-405 defines "all periods required by law" or "good moral character."

128. The evidence does not clearly, unequivocally, and convincingly establish that defendant understood that he lacked good moral character or that the statement to which he swore referred to any period of time prior to the commencement of his residence in the United States.

M. Adverse Inference

129. Defendant invoked the Fifth Amendment privilege against self-incrimination in his Answer to the Complaint and in his deposition of August 4, 1993. *See* Answer to Complaint ¶¶ 12-17, 19-20, 25-26; Govt. Ex. 1.17 *passim* (deposition of defendant). He did not testify at trial.

130. The Findings of Fact set forth in Part III.A-L, *supra,* are not based upon an adverse inference against the defendant resulting from his invocation of the Fifth Amendment privilege against self-incrimination.

Appendix D

131. In addition to the Findings of Fact in Part III.A-L, the Court infers from defendant's invocation of the Fifth Amendment in his deposition that his testimony would have been unfavorable to his interests.[7]

132. Specifically, the Court infers the following: (a) that defendant's testimony would have revealed that he voluntarily joined the Lithuanian Schutzmannschaft in July 1941 and served until mid-1944 when he was transferred to Germany to serve in the 91st Light Flak Battalion of the Luftwaffe, *see* Govt. Ex. 1.17 at 44, 50-55, 79-80 (deposition of defendant); (b) that in the course of his Schutzmannschaft service, defendant was commander of the ghetto guard in Kaunas some time in September 1941, *see* Govt. Ex. 1.17 at 61-62; (c) that in the course of his Schutzmannschaft service, defendant assisted German forces in arresting, detaining, and killing Jews in Lithuania during the Grosse Aktion of October 28-29, 1941, *see* Govt. Ex. 1.17 at 66-70; (d) that as a member of the 253rd Schutzmannschaft Battalion, defendant voluntarily searched for and fought against anti-German partisans in June 1944, *see* Govt. Ex. 1.17 at 80; (e) that in his interview with the DPC analyst in Germany in 1949, defendant falsely represented his residence and employment during World War II in order to immigrate to the United States, *see* Govt. Ex. 1.17 at 80-86; and (f) that in his interview with the United States vice-consul in Germany in 1949 defendant willfully misrepresented his residence and concealed his Schutzmannschaft and Luftwaffe service during World War II in order to immigrate to the United States, *see* Govt. Ex. 1.17 at 86-87.

---

7. The Complaint and defendant's Answer to the Complaint were not moved in evidence and will not be considered for the purpose of drawing adverse inferences.

Appendix D

IV. CONCLUSIONS OF LAW

In accordance with the foregoing, the Court makes the following conclusions of law:

A. Jurisdiction

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1345 (providing district courts with original jurisdiction for civil actions brought by the United States) and 8 U.S.C. § 1451(a) (providing district courts with original jurisdiction for denaturalization actions).

B. Standard

2. United States citizenship, once conferred, is a precious right which may not be lightly revoked. *See Fedorenko v. United States*, 449 U.S. 503, 505 (1981); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

3. Because of the importance of the interests at stake in a denaturalization proceeding, the Government must prove its case by evidence that is clear, unequivocal, and convincing so as not to leave the issue in doubt. *Kungys v. United States*, 485 U.S. 759, 772 (1988); *Fedorenko*, 449 U.S. at 505.

4. At the same time, applicants for naturalization must strictly comply with all Congressionally imposed prerequisites to the acquisition of citizenship. *Fedorenko*, 449 U.S. at 505. Failure to comply with any of these conditions renders the certificate of citizenship subject to cancellation. INA, 8 U.S.C. § 1451(a).

5. Section 340(a) of the INA provides that United States citizenship which is "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation" must be revoked and the Certificate of Naturalization canceled. 8 U.S.C. § 1451(a).

6. Defendant could not have lawfully procured his United States citizenship in 1955, if his admission to permanent residence in 1949 was not lawful. 8 U.S.C. § 1427; *Fedorenko*, 449 U.S. at 514-15.

C. Count I: Assistance in Persecution

7. The DPA excluded from displaced person status anyone who "assisted the enemy in persecuting civil populations." DPA § 2(b), 62 Stat. 1009 (incorporating by reference definition of "displaced person" in Annex I of the IRO Constitution).

8. Persecution refers to "the infliction of sufferings, harm, or death upon those who differ . . . in a way regarded as offensive" and "a campaign having for its object the subjugation or extirpation of the adherents of a religion." *United States v. Sokolov*, 814 F.2d 864, 874 (2d Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988); *United States v. Koreh*, Civ. No. 94-5408, slip op. at 16 (3d Cir. July 6, 1995).

9. Under the DPA, the Government does not have to establish that the assistance in persecution was voluntary. As the Supreme Court has stated, "an individual's service as a concentration camp armed guard — whether voluntary or involuntary — made him ineligible for a visa." *Fedorenko*, 449 U.S. at 512.

10. As commander of the ghetto guard in Kaunas on September 16-17, 1941, defendant was responsible for enforcing the confinement of Jews to the repressive conditions of the ghetto. Defendant's service as ghetto guard commander is sufficient to establish assistance in persecution.

11. Defendant's participation in the Grosse Aktion of October 28-29, 1941, constituted assistance in persecution of a civilian population.

12. The Government has proved by clear, unequivocal, and convincing evidence that defendant assisted in the persecution of civilian populations in Lithuania during World War II.

13. Defendant was ineligible to immigrate to the United States pursuant to DPA § 2(b). His entry to the United States for permanent residence in 1949 was therefore unlawful and his naturalization as a United States citizen on April 11, 1955 was illegally procured.

D. Count II: Voluntary Assistance to Enemy Forces

14. The DPA disqualified from displaced person status anyone who "voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." DPA § 2(b), 62 Stat. 1009 (incorporating by reference definition of "displaced person" as in Annex I of the IRO Constitution).

15. Defendant argues that voluntary assistance to enemy forces applies only to persons who bore arms against the United States and its allies on the *Western* front. As authority for this proposition, defendant cites a regulation adopted in June 1951.

See 8 C.F.R. § 702.8(f). Defense counsel does not explain how this regulation is relevant to defendant's immigration in 1949.

16. In *Kowalchuk*, 773 F.2d 488 (3d Cir. 1985), the Third Circuit upheld a district court finding that a defendant who emigrated to the United States in 1949 under the DPA and who had performed clerical duties for the Ukrainian Schutzmannschaft (on the Eastern front) had voluntarily assisted enemy forces.

17. At the time of defendant's immigration in 1949, "voluntarily assist[ing] the enemy forces since the outbreak of the second world war in their operations" referred to assistance to Axis forces in their military operations.

18. As company commander, defendant led the 3rd company of the 253rd Schutzmannschaft Battalion in searching for and combating Lithuanian, Byelorussian, Jewish, and Polish partisans who were fighting against the Germans. More generally, Schutzmannschaft service entailed guarding ammunition depots, bridges, and prisoners of war.

19. The Government has proved by clear, unequivocal, and convincing evidence that defendant voluntarily assisted German forces in their military operations.

20. Defendant was ineligible to immigrate to the United States pursuant to the DPA § 2(b). His entry to the United States for permanent residence in 1949 was therefore unlawful and his naturalization as a United States citizen on April 11, 1955 was illegally procured.

Appendix D

E. Count III: Membership or Participation in a Hostile Movement

21. Under DPA § 13, any person who was a member of or who participated in a movement hostile to the United States or its form of government of the United States was barred from emigrating to the United States.

22. Membership or participation in a hostile movement must be voluntary. The degree of participation or involvement in the movement is irrelevant. *Koreh,* slip op. at 24 (citing *United States v. Osidach*, 513 F. Supp at 72).

23. In *United States v. Koziy,* 540 F. Supp. 25, 33 n. 15, (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 469 U.S. 835 (1984), a former member of the Ukrainian Police and the Organization of Ukrainian Nationalists ("OUN") during World War II was found to be a member of a hostile movement. The finding was based in part on the listing of the OUN as an organization considered by the DPC to be inimical to the United States and on the fact that the OUN killed Russian partisans during the war.

24. The Lithuanian Schutzmannschaft was considered by the DPC to be an organization inimical to the United States. *See* Findings of Fact ¶ 101, *supra.*

25. The Schutzmannschaft's duties included searching for and combating Lithuanian, Byelorussian, Jewish, and Polish partisans who were fighting against the Germans.

26. Schutzmannschaft members swore oaths pledging allegiance to Adolf Hitler and to a new Europe under the rule of

Hitler. Although the Government has not proved by clear, unequivocal, and convincing evidence that defendant swore an oath of allegiance, the fact that the Schutzmannschaft required enlisting members to swear allegiance to Hitler during the time of defendant's service establishes his membership and participation in a movement hostile to the United States or its form of government.

27. The Government has established by clear, unequivocal, and convincing evidence that defendant was a voluntary member of and participant in a movement hostile to the United States or to the form of government of the United States.

28. Defendant was ineligible to immigrate to the United States pursuant to the DPA § 13. His entry to the United States for permanent residence in 1949 was therefore unlawful and his naturalization as a United States citizen on April 11, 1955 was illegally procured.

F. Count IV: Willful Misrepresentation under DPA

29. Section 10 of the DPA barred from immigration any person who willfully misrepresented material facts in order to gain admission to the U.S. as a displaced person.

30. A misrepresentation or concealment is material if it has a natural tendency to influence the relevant decision-maker's decision. It is not necessary for the Government to prove that defendant would have received a visa if he had not made the misrepresentation or concealment. *Kungys*, 485 U.S. at 770-71, 776-77.

31. Defendant misrepresented and concealed his wartime

employment and residence when being interviewed as part of his visa application by a DPC analyst and later by a U.S. vice-consul. Defendant concealed his service in the Schutzmannschaft and the Luftwaffe.

32. Defendant's misrepresentations and concealments to the DPC and the U.S. vice-consul were material because they concealed the fact that defendant had assisted the enemy in the persecution of civilians, had voluntarily assisted the military operations of the Axis powers, and had been a member of a movement hostile to the United States and its form of government. These facts would have had a natural tendency to influence the decision of the DPC and vice-consul to admit defendant to the United States as a displaced person.

33. Defendant was ineligible to immigrate to the United States pursuant to the DPA § 10. His entry to the United States for permanent residence in 1949 was therefore unlawful and his naturalization as a United States citizen on April 11, 1955 was illegally procured.

G. Count V: Advocacy or Acquiescence in Conduct Contrary to Civilization and Human Decency

34. At the time of defendant's immigration in 1949, State Department regulations prohibited visas to any alien "who had advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries." 22 C.F.R. § 53.33(j).

35. As commander of the guard of the Kaunas ghetto, defendant knew the conditions in the ghetto were contrary to civilization and human decency and that his company directly assisted in the enforcement of those conditions.

36. As an on-duty officer in the 3rd Company of the 3rd Schutzmannschaft Battalion on October 28-29, 1941, defendant was aware that Einsatzkommando 3, assisted by defendant's entire battalion, extinguished the lives of thousands of Jews in the Grosse Aktion.

37. Defendant's failure to leave the Schutzmannschaft or to act on behalf of the Jews constituted acquiescence in conduct contrary to civilization and human decency.

38. Defendant was ineligible under 22 C.F.R. § 53.33(j) for immigration to the United States. His entry to the United States for permanent residence in 1949 was therefore unlawful and his naturalization as a United States citizen on April 11, 1955 was illegally procured.

H. Count VI: Lack of Good Moral Character

39. At all times relevant to defendant's naturalization, the INA provided in relevant part that:

> No person, except as otherwise provided in this subchapter shall be naturalized unless such petitioner, . . . (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the United States. . . .

8 U.S.C. § 1427(a)(3). Section 101(f) of the INA defines "good moral character as follows:

> No person shall be regarded as, or found to be, a person of good moral character who,

> during the period for which good moral character is required to established is, or was —
>
> . . .
>
> (6) one who has given false testimony for the purpose of obtaining any benefits under this chapter. . . .
>
> The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

8 U.S.C. 1101(f).

40. Courts have held that persons who assisted in the persecution of civilian populations during World War II lacked the good moral character necessary for naturalization as United States citizens. *See United States v. Schiffer,* 831 F. Supp. 1166, 1197-99 (E.D. Pa. 1993), *aff'd* 31 F.3d 1175 (3d Cir. 1994); *United States v. Osidach,* 513 F. Supp. 51, 103 n. 31 (E.D. Pa. 1981); *United States v. Koziy,* 540 F. Supp. 25, 35 (S.D. Fla 1982), *aff'd* 728 F.2d 1314 (11th Cir.), *cert. denied,* 469 U.S. 835 (1984).

41. Assistance in persecution is not coextensive with lack of good moral character. The Court must determine whether the defendant's acts were sufficiently voluntary and related to the persecution to establish an absence of good moral character. *United States v. Schiffer,* 831 F. Supp. at 1199.

42. Defendant voluntarily joined the Schutzmannschaft,

enforced the confinement of Jews under the brutal conditions of the Faunas ghetto, and was on duty when his battalion assisted in the Grosse Aktion.

43. The fact that defendant's Schutzmannschaft service was voluntary in conjunction with his direct participation in the persecution of civilians compel the conclusion that he lacked good moral character and did not qualify for naturalization as a United States citizen under INA § 316(a)(3), 8 U.S.C. § 1427(a)(3).

44. Defendant's United States citizenship was therefore illegally procured.

I. Count VII: Procurement of Citizenship by Willful Concealment or Misrepresentation

45. Under the INA, citizenship "procured by concealment of a material fact or by willful misrepresentation" is grounds for denaturalization. 8 U.S.C. § 1451(a). The misrepresentation or concealment must be made in order to obtain naturalization, as opposed to an immigration visa. *Runavs*, 485 U.S. at 773 (plurality opinion).

46. The misrepresentations to the DPC and to the United States vice-consul made in connection with defendant's immigration to the United States, to which reference is made in Count IV, are inapplicable to Count VII.

47. The Government has failed to establish by clear, unequivocal, and convincing evidence so as not to leave the issue in doubt that defendant willfully concealed or misrepresented a material fact in order to become a United States citizen. *See* Findings of Fact ¶¶ 112-13, 115, 118, 119, 121 *supra*.

48. The Government has failed to establish by clear, unequivocal, and convincing evidence that defendant procured his United States citizenship by the willful concealment or misrepresentation of a material fact.

V. FINAL DISCUSSION

The law of denaturalization has developed around two basic principles. *See* Part I.B, *supra*. First, citizenship is of such importance that it may not be revoked in the absence of clear, unequivocal, and convincing evidence that does not leave the issue in doubt. Second, failure to comply with all the Congressionally imposed prerequisites to naturalization renders the certificate of citizenship subject to cancellation under INA § 340(a). These principles provide a framework for summarizing the issues in this case and the Court's findings of fact and conclusions of law.

Defendant's primary contention is that the Government has failed to meet its burden of proof. Defendant characterizes the evidence as a "fragmentary scattering" of documents that provide only fleeting glimpses of his activities and whereabouts during the war. He argues that the evidence does not provide a sufficiently coherent portrait of his wartime activities to sustain the Government's allegations.

The Court recognizes that the "clear, unequivocal, and convincing" standard places a heavy burden of proof on the Government in denaturalization actions. In applying that standard, the Court found that the Government failed to prove its case with respect to several allegations. Notably, the evidence regarding the "secret mission" of September 11-13, 1941 left doubt as to whether it involved the killings recorded for those

dates in the Jager Report. The evidence was also insufficient to sustain the Government's contention that the shootings in the Kaunas ghetto on September 16-17, 1941 were carried out by Schutzmannschaft guards under defendant's command.

In addition, the Court concluded that the Government failed to prove its case with respect to Count VII, in which the Government alleged that defendant willfully concealed and misrepresented material facts in responding to question 9 (membership in organizations) and question 18 (false testimony during period of residence required for naturalization) of his Application to File Petition for Naturalization Form N-400 and to item 15 (good moral character during all period required by law) of his Petition for Naturalization Form N-405. Although defendant did not disclose his membership in the Schutzmannschaft, the Luftwaffe, or Ramoves in response to question 9, the evidence was not clear, unequivocal, and convincing that the question called for disclosure of such membership or that his nondisclosure was willful. Similarly, question 18 did not clearly, unequivocally, and convincingly require defendant to reveal his misrepresentations to the DPC analyst or the vice-consul. Finally, in light of the ambiguous phrasing of item 15 of Form N-405, the evidence failed to establish that defendant's response was a willful misrepresentation of his moral character.

The Court is also mindful that the issue in the case is not whether the evidence accounts for every detail of defendant's involvement in the Holocaust and the war. Rather, the issue is whether the Government can prove by clear, unequivocal, and convincing evidence that defendant failed to comply with the requirements imposed by Congress for naturalization as a United States citizen. It is the opinion of the Court that the Government has met this burden.

Appendix D

The evidence leaves no doubt that Stelmokas voluntarily joined the Schutzmannschaft in 1941 and served until at least mid-1944 when he was transferred to a Luftwaffe unit in Germany. There can also be no doubt that he was the commander of the Kaunas ghetto guard in mid-September of 1941, was on duty when his battalion assisted Einsatzkommando 3 in the massacre of 9,200 Jews in Kaunas on October 28-29, 1941, and searched for and fought against anti-German partisans in mid-1944. Finally, there can be no doubt that Stelmokas willfully misrepresented and concealed the nature of his activities during the war when he applied in 1949 for admission to the United States as a displaced person.

These acts are inconsistent with the Congressionally imposed prerequisites for lawfully entering the United States and becoming an American citizen. Congress excluded from immigration under the DPA any persons who had assisted the Axis nations in persecution of civilians or who had voluntarily assisted the Axis nations in their military operations. Congress also chose to prohibit from immigration any person who had been a member of a movement hostile to the United States or its form of government as well as persons who willfully misrepresented or concealed material facts in order to obtain immigration benefits. The State Department prohibited the issuance of visas to persons who had acquiesced in conduct contrary to civilization or human decency. Finally, in enacting § 316(a)(3) of the INA, Congress barred persons who lacked good moral character from becoming United States citizens. Because defendant did not comply with these requirements, his United States citizenship was illegally procured and must now be revoked.

Appendix D

VI. CONCLUSION

The Court concludes for the reasons set forth above that the Government has proved its case by clear, unequivocal, and convincing evidence with respect to Counts I through VI and will therefore grant the relief requested for those Counts of the Complaint.

An appropriate Order follows.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-3440

UNITED STATES OF AMERICA

v.

JONAS STELMOKAS

ORDER

AND NOW, to wit, this 2nd day of August, 1995, following a nonjury trial held February 27 through March 3, 1995, for the reasons set forth in the accompanying Memorandum, the Court finds in favor of plaintiff, United States of America ("the Government"), and against defendant, Jonas Stelmokas, with respect to Counts I, II, III, IV, V, and VI of the Complaint, and in favor of defendant with respect to Count VII of the Complaint. In accordance therewith, **IT IS ORDERED** that **JUDGMENT IS ENTERED** in favor of the Government and against defendant on Counts I, II, III, IV, V, and VI of the Complaint, and in favor of the defendant and against the Government on Count VII of the Complaint.

IT IS FURTHER ORDERED that the Order of April 11, 1955, of the United States District Court for the Eastern District of Pennsylvania admitting defendant to United States citizenship is **REVOKED** and **SET ASIDE**.

Appendix D

IT IS FURTHER ORDERED that Certificate of Naturalization No. 7490987 is **CANCELED** and that defendant shall immediately surrender Certificate of Naturalization No. 7490987 to the Attorney General of the United States.

IT IS FURTHER ORDERED that defendant is forever restrained and enjoined from claiming any rights, privileges, benefits, or advantages under any document evidencing United States citizenship.

IT IS FURTHER ORDERED that the Clerk of the Court shall transmit a copy of this Order and Judgment to the Attorney General of the United States.

BY THE COURT:

s/ Jan E. DuBois
JAN E. DUBOIS, J.

APPENDIX E — GOVERNMENT EXHIBIT 4.35 - ENGLISH TRANSLATION

EELBA East European Language and Business Associates, Ltd.

CERTIFICATE OF TRANSLATION

I, *Audra Dainora* certify that I am competent to translate this document, and that the translation is true and accurate, to the best of my abilities.

English Title: *Order to the 3rd Battalion No. 10*

Lithuanian Title: *3-ciam Apsaugos Batalionui. ISAKYMAS Ns 10*

I certify under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the attached translation is true and correct.

Executed this *23rd* day

of *December*, 1992

s/ Audra Dainora
Audra Dainora/Certifier-Translator

Appendix E

To the Third Auxiliary Police Service Battalion

Kaunas, 15 September, 1941, Order #10

Operations Section

§1

Security and service duties for 16 September of the current year:

Battalion Duty Officer Junior Lieutenant TAMULAITIS, VYTAUTAS

Assistant to the Duty Officer - Corporal KVARACIEJUS

Duty Clerk at the Battalion Headquarters - Corporal AUKSORAITIS

Guard Commander in Vilijampole - Junior Lieutenant STELMOKAS

Guards from the 3rd Company

§2

I announce Kaunas Headquarters Number 33, §1 of the current year:

"§1. It still happens that drunken and badly clothed soldiers appear in the city, even wearing half military or half civilian clothing. In addition, a messenger arrived at the Headquarters wearing low shoes and socks which reached mid-calf.

Appendix E

There are enough officers in the Battalion. Under current conditions it is possible for them to establish needed order and discipline. It is necessary, however, for them to act more carefully, strictly and energetically. The officers have to explain to the soldiers that it is necessary to participate in the conquering of Bolshevism, and about the need for self-sacrifice and for being decent. It is said that job conditions are difficult; under good conditions, it is possible to act like a helpless person, under difficult conditions, however, one needs manliness.

Battalion and company commanders will assure that soldiers are not allowed to go to the city without a reason. When released to the city, they have to have to be neatly dressed: they have to wear either completely military clothes, or civilian ones. They should be strictly controlled so that there are no unpermitted leaves. From time to time patrols of non-commissioned officers should be sent to the city to check on the soldiers in the city: do they have permission to leave the barracks area, do they have proper clothes, are they disciplined and sober. Patrols should be comprised of disciplined and good noncommissioned officers so that they don't need to be checked.

On the above-listed issues, give the soldiers the necessary explanations.

The issue of the clothes, sleeping quarters and food will be arranged at the first opportunity.

Signed by Captain KVIECINSKAS, Kaunas Commandant.

§3

ELIZIEJUS SLEKYS, is released from the duties of Platoon

Appendix E

Commander as of 8th day of the current month, and is appointed Assistant to the Company Commander.

Reference: Kaunas Headquarters Order Number 33, 15 of the current year.

§4

Junior Lieutenant TAMULAITIS VYTAUTAS, accepted into service according to Order Number 33, §19 of this year by the Kaunas Headquarters, is appointed Battalion Ordnance officer.

Add him to Battalion Officers list and to the payroll as of the 8th day of the current month.

Note: Report Number 1.

§5

Junior Lieutenant STASYS TAMULAITIS, accepted into service according to Order Number 34, §9 of this year by the Kaunas Headquarters, is appointed Commander of the 3rd Company.

Add him to Battalion Officers list and to the payroll as of the 11th day of the current month.

Note: His Report Number 1.

§6

Lieutenant TALLAT-KELPSA is appointed Battalion Sports officer.

Appendix E

§7

Lieutenant EUZIEJUS SLEKYS is appointed Battalion Firefighter Team officer.

§8

Junior Lieutenant VYTAUTAS TAMULAITIS is appointed Battalion Education officer.

§9

Accepted into the service of the 3rd Battalion, Junior Non-Commissioned Officer BALYS PUSLYS is appointed to Battalion Headquarters Supply Platoon as a clerk with the rights of platoon sergeant.

Add him to Battalion and Headquarters Non-Commissioned Officers list and to the payroll as of the 11th day of the current month.

Note: Kaunas City Volunteers Commission Document Number 680.

The original is signed by: Captain ŠVILPA,

Battalion Commander